ACT XIV OF 1859

REGULATING

THE LIMITATION OF CIVIL SUITS

IN

BRITISH INDIA

WITH A COMMENTARY

BY

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ADVOCATE

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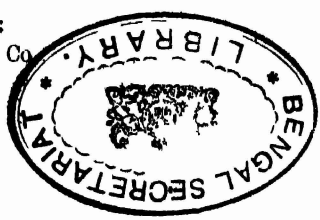

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PREFACE.

Since Act XIV of 1859 came into operation, a very large number of suits have been decided upon questions relating to the construction and interpretation of its various Sections. As the course of these decisions has not always been uniform, and as the decisions themselves, scattered through numerous volumes of Reports, may not be readily accessible to every one, it has appeared to me that to collect and methodically arrange them in a shape admitting of convenient reference, would be useful both to the Legal Profession and to the Public. This I have attempted to do in the present Treatise, for which I can claim no other merit than that it contains a careful and, so far as I have been able to make it so, a complete and correct analysis of the various rulings of the High Court of Judicature at Fort William on questions arising under the Indian Limitation Act.

Act XIV of 1859 as eventually passed, was a fragment only of a larger measure framed by the Indian Law Commissioners for regulating the acquirement and extinction of rights in this country by Prescription, and for the Limitation of Suits. An excellent account of the history of that measure and of the former state of the Law of Limitation in India, will

be found in the speech of Sir James Colvile when moving the first reading of the Draft Act in Council on the 7th July 1855.* Much information in connection with the same subject will also be found in the Special Reports of the Indian Law Commissioners for the years 1843 and 1844.

Considering the care with which, as is seen from these Reports, the Indian Limitation Act was prepared, the length of time—nearly twenty years—during which it was being matured, and the conspicuous ability of the eminent lawyer by whom it was finally reduced into its present form, it may seem remarkable that almost every one of its Sections should in turn have been found open to a diversity of constructions. This result is partly, perhaps, attributable to the extreme brevity of the Act itself occasioning obscurity in its provisions, partly to the recognized difficulty of framing any law embracing subjects of great extent and detail which in its operation shall be found free from uncertainty in many circumstances, but still more, it may be thought, to an unconscious tendency on the part of Judicial Officers, where the right of a particular plaintiff seems conclusively established, so to construe the terms of the Law as that they shall not conflict with what appears to be the equity and justice of the case.

As the principles of expediency on which all Laws of Limitation rest may be found explained in numerous legal text-books, it is unnecessary to refer to them

* See Proceedings of the Legislative Council of India for the years 1854-1855. Vol I. p. 544.

here further than to point out that it is essential for the public interest that the provisions of such Laws should in all cases be rigidly enforced, and should never be relaxed on considerations of individual hardship.

In attempting to explain the provisions of the Indian Limitation Act by a collection of decided cases, it does not seem desirable to have recourse to illustrations borrowed from the decisions of the English Courts. As the Laws of Limitation in England and in India, although containing much in common, are not identical, decisions pronounced under the former could not safely be accepted as precedents in construing the latter, without a careful examination and comparison of the terms of both.

The account of the old Limitation Laws in India, and the analysis of the decisions of the Indian Courts under these Laws given by Mr. Macpherson in his work on the Procedure of the Civil Courts in British India, are so complete, that it would be superfluous to do more than refer those who may desire to compare the provisions and operation of the present and former Laws, to Mr. Macpherson's valuable book.

For several important decisions of the Madras High Court, I have to acknowledge my obligations to the excellent Reports by Mr. Whitley Stokes of cases decided in that Court.

A large proportion of the decisions to which reference is made in the following pages will be found in Mr. D. Sutherland's Weekly Reporter, a work which deserves praise for the punctuality with which it is issued.

Numerous cases decided under various Sections of the Act after the text of this Treatise had been printed, will be found referred to in the notes added by way of an Appendix.

CALCUTTA,
October 27*th*, 1866.

CORRIGENDA.

PAGE 59, line 3 from bottom, for "esentially" read "essentially"
" 75, line 13 from top, for "either" read "the"
" 104, line 10 from top, for "admitted" read "alleged."
" 119, line 2 from bottom, for "75" read "79."
" 167, line 1, for "177" read "117."

ADDENDUM.

PAGE 246. To the note on page 68, a reference may be added to the case of *Jogendur hunder Roy* v. *CHuronath Roy*, *W. R. VI.* 218, in which it was held by TREVOR and CAMPBELL J. J. that although the mere non-payment of rent by a tenant does not constitute an adverse possession, limitation will nevertheless run in favour of a tenant who openly sets up an adverse title, and claims to hold under the title so set up.

ACT No XIV OF 1859.*

Passed by the Legislative Council of India. Received the Assent of the Governor-General on the 5th of May 1859.

AN ACT TO PROVIDE FOR THE LIMITATION OF SUITS.

Preamble.

WHEREAS it is expedient to amend and consolidate the laws relating to the limitation of suits; It is enacted as follows:—

Limitation of suits.

I. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

* Modified by Acts XI and XXXII of 1861, and by Act XIV of 1862, see Appendix.

A LAW limiting the period within which suits must be brought, is to be construed strictly; and where the Legislature has not expressly limited the time for suing, the Court will not readily, if it will under any circumstances, prescribe a limit, merely because there is reason to infer that the Legislature intended to prescribe that limit although it has accidentally omitted to do so. *Syed Mahomed Afzul* v. *Kanhya Lal. W. R. II.* 263.

Much discussion has arisen as to the time when the plea of limitation should be taken. It has been decided that in a Court of original jurisdiction the issue of limitation may be considered by the Court, although not raised in the pleadings. *The Nawab Nazim of Bengal* v. *Prossonno Narain Deb. Coryton's Rep. I.* 25. On the other hand, it has been held that a plea of limitation which has not been raised in the Court of first instance, cannot be urged on appeal. *Digumburee Dabea* v. *Nund Gopal Banerjee. W. R. Misc. App. I.* 1. This ruling is in accordance with the decision in the case of *Nundolall Haldar* v. *Radhamohun Haldar, Hay's Rep. II.* 49, that where a plea of limitation was not taken by the defendant in the Court of first instance, the Court of appeal was wrong in raising the issue.* There is, however, some uncertainty on the point. It was held by the late Sudder Court in the case of *Rama Singh* v. *Dhyan Singh, S. D. D.* 1849, *p.* 126, that the Court was bound to take up and enforce the rule of limitation provided under Section 14 of Regulation III of 1793, at any stage of the proceedings, even if not urged in the pleadings. On the other hand, in the case of *The Government* v. *The Rajah of Burdwan, Moore's I. A. C. IV.* 466, in which it appeared that the right of the Government to sue was barred by the rule of limitation provided in Regulation II of 1805, the

* In this case the plea of limitation was taken under the provisions of Section 3, Act XIII of 1848, by which it is enacted that no suit for contesting an award of the Revenue Authorities, made after the passing of that Act, shall be entertained after the expiration of three years from the date of the final award.

Privy Council admitted the plea of limitation at the last stage of the proceedings, and disposed of the case upon that issue. In that case, however, it was assigned as a special reason for admitting the plea of limitation, that the proceedings in the case were not of the nature of a regular suit; from which it may perhaps be inferred to have been their Lordship's opinion, that in regular suits, the plea of limitation, if not urged in the original pleadings, cannot be subsequently entertained. In the case of *Emambandi* v. *Hur Gobind Ghose, Moore's I. A. C. IV.* 403, the late Sudder Court had reversed a decision of the lower court and dismissed the case, upon the ground that the suit was barred by limitation; but the Privy Council set aside the decision of the Sudder Court, on the ground that as the plea of limitation had not been originally raised in the pleadings, and the plaintiff consequently had not had an opportunity of meeting it, it was inadmissible. In conformity with this precedent the Sudder Court in the case of *Nursing Deb* v. *Ryemonee Dabea, S. D. D.* 1859, *p.* 372, held, on an application for a review of a previous judgment of the court, in which the court had gone upon a plea of limitation under Act XIII of 1848 which had not been pleaded in the lower courts, that when a plea of limitation is not originally urged in the pleadings in bar of suit, a defendant cannot be allowed to bring it forward on appeal, but must be considered to have waived it and to be willing to have the case tried upon its merits. And this would seem to have been the view taken by the High Court in the case of *Leelanund Singh* v. *Purbhoo Narain Singh. W. R. II.* 256, in which the plea of limitation having been raised for the first time before the High Court on appeal, it was observed that even if the plaintiff had not been within time, the court would not have been inclined to consider the plea of limitation raised, as it had not been taken in the court of first instance, nor in the lower appellate court. *See* also the case of *Ranee Shama Soonduree* v. *Jardine Skinner and Co. W. R. III.* 144.

It is however to be observed that the words of the Section under notice, to the effect that after the periods of limitation prescribed in the Act "*no suit shall be maintained,*" are at once distinct and stringent, and would seem to withdraw from the jurisdiction of any court, whether original or appellate, all cases to which the rule of limitation can be applied. Further, it is to be remarked that under the provisions of Section 32, Act VIII of 1859, it is required, that "if upon the face of the "plaint, or after questioning the plaintiff, it appear to the court "that the right of action is barred by lapse of time, the court "shall reject the plaint." These words may be taken to imply that the courts are bound in all cases, of their own motion, to consider and dispose of the issue of limitation, and that if this duty be neglected by the original court, it will then be the duty of the appellate court to rectify the omission, and to apply the rule of limitation at whatever stage of the proceedings it may be ascertained to have a bearing on the case. In this view the doctrine of waiver would be inadmissible, and questions of limitation arising for the first time in an appellate court would fall to be dealt with—like a plea to the jurisdiction,—either by remand to the lower court, or by trial in the appellate court itself, if there be sufficient evidence to allow of that being done. *See* the cases of *Doorga Monee Dabea* v. *Bidhobuddun Mookerjee W. R. II.* 157, and *Brojo Soondur Hoom Roy* v. *Gour Kishore Hoom Roy. W. R. II.* 161; *see* also *Mugno Moe Dabea* v. *Hur Chunder Raoot. W. R. Act X Cases. III.* 146. This course was actually followed in the case of *Kishen Chunder Ghose* v. *Mussamut Ashoorun. Marshall's Rep. I.* 647, in which there being reason to suppose that the plaintiff's claim, which had been dismissed upon the merits by the court of first instance, and subsequently decreed by the lower appellate court, would be found to be barred by the Statute of Limitations, the High Court remitted the case with a direction to raise and try the issue.

The case of *Ramessur Ghose* v. *Khetter Mohun Ghose, W. R. III.* 184, was remanded by the High Court with a direction to the lower court to try properly the special plea of minority

set up by the plaintiff as the ground upon which he claimed exemption from the general law of limitation under which his suit would have been barred. On remand the lower court held that as the plaintiff had sued within twelve years from the time he attained majority, his suit was not barred. On appeal from this decision it was contended by the defendant that as more than twelve years had elapsed from the time when the cause of action arose, the plaintiff was entitled only to three years and not to twelve years from the date of his majority within which to bring his suit, and that having allowed more than three years to elapse before he instituted his suit, limitation applied. This point had not been taken when the case was originally heard on appeal and remanded, the only objection then made being that the lower court had erred in its calculation as to the time when the plaintiff attained majority, and that there was no proof that he had brought his suit within twelve years from that date. The court nevertheless was of opinion that as the new objection was one patent on the face of the plaint, and *moreover involved a question of jurisdiction,* it might even at that stage of the proceedings be taken up and determined, notwithstanding the laches of the defendant in not pleading it before.

Two decisions of the High Court of Madras may here be noticed as showing that the same uncertainty has arisen in that court in dealing with the point in question. In the case of *Narain Reddi* v. *Krishna Padayachi. Madras High Court Rep. I.* 358, it was held, that where the Statute of Limitations was not pleaded in the original court, it might be set up in the appeal court, if evidence could be taken there in reply to such plea; but that on *special appeal* the Statute of Limitations cannot for the first time be pleaded, unless the facts which raise the plea are admitted. In the case of *Ramanatha Mudali* v. *Vaithalinga Mudali. Madras High Court Rep. II.* 238, plaintiff sued for money due by the defendants on a settlement of accounts, and obtained a judgment on the merits which was

confirmed on regular appeal. The defendants then presented a special appeal, in which, for the first time, they relied upon a plea of limitation under Act XIV of 1859. The case of *Narain Reddi* and the case of *The Rajah of Burdwan* v. *The Government of Bengal*, already noticed, were referred to as showing that the plea of limitation could be set up on special appeal; but it was held by the court that the Statute of Limitations if relied upon as a ground of defence should be pleaded in every case in the original court. It was observed that the case of *Narain Reddi* introduced new law, and that the court was unwilling to carry the principle laid down in that case further than the actual words used might require, and that it was inapplicable to a case in which the facts raising the plea are not admitted by the plaintiff. It was further observed that in *The Rajah of Burdwan's* case, there were no pleadings in the court below. The investigation was irregularly conducted without any pleadings at all, and no opportunity was given of raising the issue of limitation until the case came before the Privy Council.

Similar uncertainty prevails as to whether questions of limitation arising under the provisions of various Sections of Act X of 1859, can be considered by an appellate court when the plea has not been raised in the court of first resort. The point was negatively decided in the case of *Hurro Soonduree Dabea* v. *The Collector of Rajshahye* (*No.* 32 *of* 1863 *under Act X of* 1859) on the 26th January 1864, and in the case of *Ranee Suvarnamayi* v. *Singrip Baboo*, (*No.* 2663 *of* 1863, *under Act X of* 1859) on the 30th July 1864; but affirmatively held in the case of *Kewell Jut Roy* v. *Mahomed Dad Khan*, (*No.* 2037 *of* 1863, *under Act X of* 1859) on the 11th July 1864. In this last case the Judges are reported to have said. "In taking up this appeal we observe that a considerable portion of the claim for rent is barred by limitation; neither the Deputy Collector, nor the Judge appears to have been aware of the fact, and the objection is not even now taken before us in special appeal." Under such circum-

stances it might have been thought that the plea of limitation should be held to be waived, but the Court nevertheless disallowed so much of the claim as was found to be barred by limitation, and the view taken in this case was followed in the case of *Sushteebur Mookerjee* v. *H. Mackenzie, W. R. Act X Cases, II.* 76, in which it was observed that although the defendant did not raise the plea in bar of suit, still as the plaint clearly showed that the claim was barred, and as there are rulings of the Court that the question being one of jurisdiction can be raised at any stage of the case, the claim must be dismissed, and that it was needless to remand the case for further evidence since it was patent in the plaint itself that the claim was barred.

Where the defendant appealed on the question of limitation, and the lower appellate Court, holding that the rule of limitation did not apply, remitted the case to be tried on its merits, and these were decided against the defendant in the Court of first instance and afterwards upon appeal, and the defendant then brought a special appeal in the High Court in which he again pleaded that the case was barred by limitation, it was held that he ought to have appealed when the point of limitation was decided by the lower appellate Court, and that he could not appeal upon that ground after the case had been decided upon the merits. *Mussamut Beekun Koer* v. *Maharajah Bahadoor. Marshall's Rep. I.* 66. But the more recent case of *Sheikh Warris Ally* v. *Musst. Oozeerun Beebee, W. R. I.* 51, it was decided that the order of a Judge over-ruling the defence of limitation and remanding the suit for trial on the merits, if not immediately appealed against as a decree, may as an interlocutory order, under Section 372, Act VIII of 1859, be objected to when the ultimate decision is appealed against.

Under Act VIII of 1859, it is not necessary for a defendant respondent to file a separate petition of appeal against the ruling of the lower Court on the point of limitation. That point may without such separate appeal, be raised by a respondent under Section 348 of that Act. *Okhetoonissa* v. *Koochil Sirdar. W. R. II.* 45.

Where it is possible to separate the issues of limitation and title, they should be tried separately and not mixed up together. *W. Woodin* v. *Umbika Soonduree Dossee W. R. III.* 226.

Where a plaintiff sued for posssession of two lots of land from which he alleged that he had been dispossessed by the defendant, and the claim was dismissed as to one lot on the plea of limitation, the plaintiff having failed to prove possession within twelve years next before the institution of the suit, it was held that although the defendant had not specifically pleaded limitation with respect to the other lot, yet as the plaintiff admitted that his cause of action with respect to both lots arose simultaneously, he was bound to show that his dispossession from this lot also took place within twelve years before action brought. *Munshi Mowajin Hossein* v. *Rajkoomaree Dossee. Hay's Rep. II.* 177.

Where an issue of limitation is raised and tried in the Court of first instance, it must be considered and determined in the Court of appeal. *Narain Dass* v. *Greesh Chunder Roy. W. R. I.* 59. Where it was contended in special appeal that a plea of limitation taken in the lower Court had not been considered there, it was held that the mere fact of the lower Court having entered into the merits of the case after noticing in its judgment that limitation had been pleaded, shewed that the point of limitation had been over-ruled. *Ramnath Sein Lushkur* v. *G. P. Wise. Hay's Rep. I.* 310. In this case it was observed:—"The lower Court disposes of the question of limitation by finding that it is only recently,—within the last few years,—that the defendant has got into possession." This however can scarcely be considered a *distinct* finding, such as has been required in other cases. *See Bhugwan Chunder Nundee* v. *Kedarnath Acharjee. W. R. II.* 153.

A sued to recover lands from which he alleged that he had been ousted by B. C intervened, representing that she had purchased A's rights under a deed of sale. The Moonsiff found the purchase proved and dismissed A's suit, but the lower appellate Court, holding that C's purchase was not proved, reversed this decision. On special appeal, C urged that a plea of

limitation which she had put forward in the lower court had not been enquired into. It was held, that the plea of limitation did not arise on the record as between A and B, and that as C's interest in the case fell when her purchase was found not to be proved, the plea of limitation fell with it. *Sheebnarain Bhuttacharjee* v. *Shusheemooklee Dossee. Hay's Rep. I.* 255.

Where one of two judges sitting as an appellate court, agrees with the lower court in considering that the plaintiff's evidence is insufficient to bring the case within the period of limitation prescribed by law for such cases, such determination is final under Section 23, Act XXIII of 1861. *Gopee Kissen Gossain* v. *Bindabun Chunder Sirkar Chowdhry, W. R. II.* 221. On this subject *see* also *Watson and Co.* v. *The Government, W. R. III. pp.* 78, 79.

In calculating the period of limitation for bringing suits, the day on which the cause of action arose, should be included in the computation. *Hurro Soonderee Dabea* v. *Kally Mohun, Marshall's Rep. I.* 138. *W. R. Sp. No. p.* 46, in which case reference was made to the case of *Brijokishore Dhur* v. *Mudhoosoodun Roy, S. D. D.* 1859, *p.* 1232. In this case, which was brought before Act XIV of 1859 came into operation, the plaintiff sued to reverse a sale which had taken place on the 3rd January 1845. The plaint was registered as filed upon the 3rd January 1857. The court of first instance dismissed the claim as barred by limitation, but the lower appellate court, considering it very probable that the plaint had really been filed on the 2nd January, and that the amlah of the court had neglected to note that it was filed on that day, held that the suit was in time. A special appeal having been admitted in order to try, whether the day of sale itself should be included in calculating the period of limitation,—with reference to the recognized principle that in calculating the period for appeals, the day of the order appealed from is not included,—it was held by the Sudder Court, that the day of sale should be included in computing the period of limita-

tion, since the act of sale gave the plaintiff his cause of action, and limitation runs from the date of such act. It was also observed that the surmise of the lower appellate court, that although the plaint was registered as having been filed on the 3rd January, it might really have been filed on the 2nd, was altogether inadmissible. The recent decision of the High Court, in the case of *Bungshee Mohun Doss* v. *Radha Monee Chowdhrinee*, *W. R. Act X Cases, IV.* 30, may be noted as bearing upon this point, and perhaps as somewhat favouring a contrary view to that followed in the cases above cited. Section 77, Act X of 1859, provides that if in actions for rent, a third person appears as claimant, his claim shall be enquired into by the Collector and the suit decided according to the result of that enquiry, but "that the decision of the Collector shall not affect the right of either party who may have a legal title to the rent, to establish his title by suit in the Civil Court, if instituted within one year from the date of the decision." A plaintiff having instituted a suit of the above nature, within a year from the date of a Collector's decision—if in computing the time the date of the decision was excluded,—it was held by the lower appellate court, and on appeal by the High Court, that the true construction of the words above quoted is, that the date or day on which the Collector pronounced his decision being excluded, a full year reckoned from the end of that day is given for the institution of a suit in the Civil Court, and that consequently the plaintiff's suit was in time.

Much uncertainty has prevailed as to the rule to be followed when the period of limitation expires at a time when the courts are closed Under the old Law of Limitation—Section 14, Regulation III of 1793,—it was held by the Agra Sudder Court that proceedings not instituted before the expiry of the period of limitation cannot be instituted afterwards, even although the last day may have fallen during the Dusserah, or any other *authorized* vacation; but that if the time expires while the court

is unexpectedly shut, as, in one instance, on account of the death of a near relative of the judge, the suit will be admissible on the re-opening of the court, since the closing of the court on such an occasion, without legal authority, or public announcement, is a contingency against which the suitor cannot be expected to provide. *See Macpherson on Mortgages. 2nd. ed. p.* 182. A less strict construction of the law was adopted by the late Sudder Court of Bengal, in the case of *Kaleecoomar Roy* v. *Syed Wuzeer Ahud Hosseinee Chowdhree, S. D. D.* 1858. *p.* 1778, in which, the defendant having pleaded limitation on the ground that the plaintiff's suit was brought some days beyond the period of twelve years from the time when his cause of action arose, it was held that as the last day of the twelve years was a close holiday, and the plaint was presented on the first open court day, the suit was within time. But the correctness of this decision has been much questioned, and indeed can only be defended by giving the widest construction to the provision of Section 14, Regulation III of 1793, by which the inability of the plaintiff from any good and sufficient cause to obtain redress, is made a ground for extending the period of limitation, and as no such latitude of exemption is provided under Act XIV of 1859, the decision cannot be taken as a precedent in cases arising under that Act. As such, however, it would seem to have been accepted in two cases decided by the High Court. In the case of *Kanye Deyee* v. *Bipro Persaud Mytee, W. R. I.* 341, it was held that when the day on which the period of limitation expired was a close holiday, and the plaint was filed on the subsequent day, such filing was in time. Similarly in the case of *Maneerun* v. *Luteefun, W. R. III.* 46, it was held that when the period of limitation expires at a time when the courts are closed, it is sufficient if the suit be instituted on the first open court day. But the ruling of the Full Bench in the case of *Rajkisto Roy* v. *Denobundhoo Surmah, W. R. S. C. Ct. Cases, III.* 5, definitively establishes the contrary view, namely, that where a period has been fixed under Act XIV of 1859, within which a suit must

be brought, the court has no discretion to extend the period so fixed by the Act, on the ground that it expires upon a day when the court is closed. To the same effect, *Tarinee Churn Singh* v. *S. E. Collis*, *W. R. III.* 209. That this ruling is applicable as well where the closing of the court is accidental and unexpected, as where the court happens to be closed during an authorized vacation, may be inferred from the following decision of the Madras High Court. A suit was brought on the 4th January 1862, which under Act XIV of 1859,—finally coming into operation upon the 1st January 1862,—was barred by limitation. The lower court held that it was not barred, inasmuch as the Civil Judge of the district in which the suit was filed, in order to meet the inconvenience of an unexpected adjournment of the courts for the Christmas holidays, had directed that all suits brought on the 4th January 1862, when the courts re-opened, should be treated as if brought under the old law. On appeal it was held that the Civil Judge had no power to make such an order, and that the Act must be applied. It was observed by the Court, that *no sort of equitable construction can be put on a Statute of Limitation*, and that on the authority of the English cases it would seem, that even if the Courts of Justice were shut up in time of war, so that no suit could be brought, limitation would not the less continue to run. *Madras High Court Rep. II.* 268.

The rule with reference to the presentment of appeals is different. Under Regulation VII of 1832, Section 2, Clause 4, it was provided that "when the period for preferring appeals expires during the adjournment of the Court on account of any holiday or vacation, no default shall attach to the appellant, provided the appeal be presented immediately on the re-opening of the Court." This clause was repealed by Act X of 1861, and the procedure is now regulated by Section 333, Act VIII of 1859, which enacts that appeals are to be presented within thirty days if the appeal be to a District Court, and within ninety days if the appeal be to the Sudder (High) Court, unless

the appellant shall show to the satisfaction of the Appellate Court, sufficient cause for not having presented it within such periods. In a case decided on the 24th April, 1865, *W. R. S. C. Ct. Cases, III.* 6, *and Note*, it was held that the appellant is entitled to have an extra day, when the last day on which he can file an appeal falls on a Sunday or other close holiday. *See* also the case of *Rajkisto Roy* v. *Denobundhoo Surmah*, noticed above. In the case of *Nubkissen Singh* v. *Kameenee Dossee*, *Bourke's Rep. App. Cases, I.* 38, a decree having been passed by the High Court on the 5th February 1864, a petition for review of judgment was presented on the 8th March, but was not disposed of until the 24th December of the same year, when it was rejected. Nineteen days after the date of its rejection a petition of appeal from the original judgment was presented to the Registrar for the purpose of being filed, but he declined to file it on the ground that it had not in accordance with the provisions of Section 333, Act VIII of 1859, been presented within ninety days from the date of the original decree. In support of the application it was contended that the petition ought to be admitted, inasmuch as the pendency of the application for review of judgment was a sufficient cause within the meaning of the terms of the section referred to for not presenting the petition of appeal within the prescribed period of ninety days; but it was unanimously held by the entire Bench, that the time for filing the application for appeal, must be taken to run from the date of the original judgment, and that the circumstance that an application for a review of that judgment was pending, was no sufficient ground for postponing the petition of appeal.

Where, owing to some difficulty in procuring stamped paper, a plaint was presented to the Clerk of the Court at his private residence after the usual office hours on the last day of the period of limitation, and theClerk refused to receive it, it was held on a reference to the High Court that, under the circumstances, the plaint must be considered to have been submitted

to the proper officer of the Court within the period allowed by the Law of Limitation. *Muddun Mohun Chuckerbutty* v. *Tubeer Biswas, Mofussil S. C. Ct. References, p.* 36. The circumstances which prevented the plaintiff from procuring stamped paper in due time, do not appear from the report of the case, and in other respects the correctness of the decision may seem open to doubt.

Where a plaint filed two days before the expiry of the period of limitation was found to be insufficiently stamped, and was returned to have the proper stamp affixed, it was held that the plaintiff had only two days after the date of the order for the return of the plaint to file a fresh plaint on a proper stamp. *Nund Doolal Sirkar* v. *Dwarkanath Biswas. W. R. II.* 9. Where a plaint having been returned as not duly verified was not again presented for registration until more than six months after the period of limitation applicable to the suit had expired, it was held that the order of the lower court refusing to receive it was under the circumtances a correct and proper order. It was observed that if the plaintiff had intended to appeal against the original order returning the plaint for verification he should have appealed at the time. *Aboo Beebee* v. *The Collector of Jessore, W. R. IV.* 81. Where a plaint was filed upon the 26th, but not registered in the books of the Court until the 27th May, it was held that the former day must be taken to be the date of the institution of the suit. *Gour Monee Dossee* v. *Juggobundhoo Bose. W. R. III.* 1.

Where a plaint was returned to be amended as not containing the particulars required by Section 26, Act VIII of 1859 and was amended accordingly by filing a supplemental plaint together with the original plaint two days after, it was held that the date of first filing the original plaint should, in computing, the period of limitation, be taken to be the date of the institution of the suit. *Sham Chand Koondoo* v. *Kallykanth Roy, Hay's Rep. II.* 314. *Marshall's Rep. I.* 336. Where a plaint presented within two days of the expiry of a prescribed period of limitation

was returned for amendment, but no time was fixed within which the amendment should be made, and the plaint was reproduced and filed some days beyond the prescribed period of limitation, the defendant pleaded that the suit was barred; but it was held by the Madras High Court that the date of the original presentment of the plaint was to be taken to be the date of commencing the suit, and it was observed that the order of return for amendment was not to be read as if it had contained the words, " you must produce the amended plaint within the two days still remaining of the period of limitation," but as if it had said, " you shall have a reasonable time for amending." *Ismail Sahib* v. *Arumuga Chetti, Madras High Court Rep. I.* 427.

A plaint was filed in April 1864, in a suit for the price of goods sold in May 1861. The names of six defendants appeared in the plaint, but in July 1864, leave was asked and given to add the name of a seventh defendant as a party. It was pleaded that as against the defendant thus added the suit was barred by limitation, but the court held that as the suit had been begun before the expiry of the period of limitation, it was not barred as against the defendant subsequently added. *Issur Persaud* v. *Oorjoon Lall. Hyde's Rep. II.* 248. The correctness of this ruling may however be questioned. As against the defendant subsequently joined, the suit may perhaps more reasonably be taken to have commenced when that defendant's name was inserted in the plaint, and there seems to be no warrant for allowing such insertion to have retrospective effect. If the plaintiff had failed in his suit against the six defendants whose names originally appeared in the plaint, and had then brought a fresh action against the seventh defendant, he could not, under the provisions of Section 14 of the Act, have been allowed in computing the period of limitation to deduct the time during which he was suing wrong parties on the same cause of action,—*see* the cases cited in the notes to Section 14,—and it would seem equally unreasonable to permit a plaintiff to add a defendant as against whom

the period of limitation has run, to other defendants as against whom the suit has been brought in time.

In computing the period of limitation in a case in which it is sought to extend the time by reason of a pauper suit having been commenced, the commencement of the suit is to be reckoned from the day when the application to sue *in forma pauperis* was filed, and not merely from the date of its allowance. *Seetaram Gour* v. *Golucknath Dutt*, *Hay's Rep. I.* 378. *Marshall's Rep. I.* 174. *W. R. Sp. No. p.* 53. *Kanye Deyee* v. *Bipro Persaud Mytee. W. R. I.* 341. In the case of *Seetaram Gour*, it was observed by the Court that, "by Section "308, Act VIII of 1859, the application to sue *in forma* "*pauperis*, if allowed, is to be deemed a plaint. The applica- "tion in the present case was admitted. It therefore became a "plaint, and it must certainly be taken to have been filed on that "day on which it was presented as an application. If this were "not so, cases in which the period of limitation is one year, "might be barred while the judge is considering whether the "application to sue *in forma pauperis* ought to be admitted. "In this very case the application was not admitted until "more than one year after it was presented." Under the old procedure it would appear that no allowance was made for the time during which an application for permission to sue *in forma pauperis* was pending in court. *See Macpherson's Civil Procedure, 4th edition, p.* 84, and the cases there cited.

In a suit to set aside a deed, the cause of action arises when the deed is executed, and limitation runs from that time. *Jeonath Bhuggut* v. *Roopa Koonwur. W. R. II.* 273, *Note.* Where a contract is entered into for payment of money at a certain future day, the cause of action accrues and limitation runs from the day so fixed and not from the date of the contract. *Kishen Kinkur Ghose* v. *Borodakanth Roy. Hay's Rep. II.* 656. *Marshall's Rep. I.* 533. Each instalment of a *kistibundee* as it accrues due constitutes a fresh cause of action. *Enaetoollah Chowdry* v. *Hurro Chunder Dey*, *W. R. II.* 39. In

the case of *Karuppanna Nayak* v. *Nallamma Nayak*, *Madras High Court Rep. I.* 209, the plaintiff sued on a bond payable in seven annual instalments and containing a condition that upon failure to pay any one instalment the whole principal sum secured should immediately become due and recoverable with interest. The defendant, who had failed to pay any one of the instalments, pleaded limitation on the ground that the suit was instituted more than six years after the time the first instalment fell due, when, by the terms of the bond, the plaintiff's right of action accrued for the whole sum secured. It was held by the lower court that limitation only ran from the date at which the last instalment was made payable, and the plaintiff accordingly obtained a decree; but the case having been referred to the High Court, it was decided that the proper construction of the stipulation in respect to failure in payment of a single instalment was, that upon such failure, the whole principal sum secured by the bond immediately became due and recoverable with interest, that the plaintiff's cause of action in respect of such principal sum and interest arose at the time of the failure to pay the first instalment, and that consequently the plaintiff's suit, which was not instituted until more than six years after the first instalment became due, was barred by limitation. The Court observed that the granting of further time for payment after default in payment of the first instalment, was quite an optional indulgence and forbearance on the part of the plaintiff. But see the cases of *Hullodhur Bangal* v. *C. S. Hogg*, *W. R. I.* 189, and *Breen* v. *Balfour*, *Bourke's Rep. I.* 120, cited *postea* in the remarks on Section 4.

In the case of *Hills* v. *Alum Cazee*, *Mofussil S. C. Ct. References*, *p.* 45, the plaintiff sued the defendant for breach of a contract to cultivate indigo during the season 1859-60, instituting his suit on the 17th April 1863. The defendant pleaded that as he had refused to perform his contract in March 1860, the plaintiff's cause of action must be taken to have accrued at that time, and that as more than three years had been allowed to elapse

before plaintiff's suit was commenced, it was barred by limitation. It appeared from the evidence that the defendant had actually refused to cultivate in March 1860, and that the plaintiff had thereupon proceeded against him before the Magistrate, under Act XI of 1860, to enforce specific performance of the contract. On this evidence the lower court seems to have sanctioned the defendant's plea of limitation; but on a reference to the High Court it was observed, that under his contract to sow indigo for the season 1859-60, the defendant would have fulfilled the terms of his engagement by sowing at any time before the expiration of the time for sowing in the year 1860, and that it was not alleged by the defendant, nor proved by the evidence, that the season for sowing in that year expired before the end of April; that on the defendants refusal to sow in March, it was optional for the plaintiff to treat such refusal as a breach or not, but that the proceedings taken by him to enforce the execution of the contract, show that it was not his intention to treat the contract as broken; that the plaintiff not having elected to treat the contract as broken on the defendant's refusal in March, his cause of action did not arise until the time when that year's season for sowing was at an end and it became impossible for the defendant to fulfil his agreement, and that the suit having been instituted within three years from that time was consequently not barred by limitation. As to the time when the cause of action arises, *see* also, the case of *Smith* v. *Gopaul Sheik*, *Mofussil S. C. Ct. References*, *p.* 148, in which it was observed that according to a rule of English Law, which may perhaps be fairly applied in this country, where a refusal to perform a contract can be proved by evidence which shews that one party has utterly renounced the contract, or has put it out of his own power to perform it, the injured party may at his option sue at once, or wait till the time when the act was to be done.

In the case of *Indoo Bhoosun Deb Roy* v. *T. Kenny*, *Mofussil S. C. Ct. References*, *p.* 106, the plaintiff sued to recover the value of certain trees growing on his land, which he alleged that the defendant, the lessee of the said land, had cut

down contrary to the terms of his lease, and without his, plaintiff's, leave or licence. The defendant pleaded limitation, and the case having been referred to the High Court, it was held that the claim was not maintainable, inasmuch as the cause of action had accrued more than six years before the suit was instituted. The Court observed that "as a general rule of law, it may be said, that the time of limitation runs from the period when the contract is broken and not from the time when the knowledge of the breach of contract comes to the plaintiff, whether such breach be patent and discoverable, or whether it be concealed and undiscoverable. The case for the plaintiff is that the defendant occupied land under a lease by which he contracted not to cut down trees—that in breach of that contract he did cut down trees more than six years prior to the institution of the suit—that the lease in question expired within the six years—that the cause of action did not arise till the expiry of the lease—and that therefore this suit for damages will lie. But the date of the expiry of the term of the lease does not affect the question. The cutting down trees was the cause of action, and we see no force and do not concur in the argument that the fact of the defendant having contracted not to cut trees must be construed as equivalent to a covenant on his part to surrender the land with the trees still standing when the lease expired. On the expiry of the lease, if not sooner, the plaintiff could, if he had chosen, have ascertained whether his trees had been cut or not, and if he really did not know until lately that the trees had been cut, he was certainly guilty of laches in not making enquiries respecting his property at an earlier period, and has no conceivable ground for complaint that he is not now entitled to recover."

The following case is important as shewing how the period of limitation is to be reckoned in a suit brought upon a dishonoured bill of exchange.—On the 12th October 1855, A accepted a bill of exchange at three months drawn upon him by B, in favour of C, which bill was subsequently endorsed to D, for whom it was discounted by E. At maturity the bill

was dishonoured. In the year 1861, E sued D on account of the bill and obtained a decree. On the 15th July 1864, D paid the amount decreed with costs, and thereafter sued A as acceptor of the bill, to recover the amount thereof paid by him. For the defendant A it was contended that the action was barred by limitation which began to run from the date of the dishonour of the bill which happened more than three (six ?) years before the institution of the plaintiff's suit. For the plaintiff it was urged on the authority of the English cases, *Reynolds* v. *Doyle,* 1 M. & Gr. 753, *Collinge* v. *Heywood,* 9 Ad. & E. 633, that as the effect of endorsing a bill is only a conditional contract on the part of the endorser to pay if the acceptor does not, the endorser is to be regarded merely as a surety, against whom limitation runs, not from the time of the default of his principal on the dishonour of the bill, but from the time when he may have himself been compelled to make payment, and that in this case D's suit was in time, since his cause of action did not arise until payment was made by him on the 15th July 1864. The Court, however, held, and the decision was confirmed on appeal, that the plaintiff's cause of action must be taken to have arisen on the dishonour of the bill, and that the period of limitation should be reckoned from that time. *Mohendro Lall Bose* v. *Jadub Kissen Singh. Bourke's Rep. I.* 157.

In a suit by a sharer in a joint estate for reimbursement from his co-sharers of payments made by him, over and above his share, to save the property from sale in execution of a decree for rent at the suit of the Zemindar, the cause of action arises and the period of limitation must be taken to run from the date of the plaintiff's payment and not from the date of the decree. *Gour Monee Dossee* v. *Boykanth Nath Saha. W. R. II.* 159.

Where a person purchased certain lands at an auction sale for arrears of Revenue and obtained possession, but after litigation was dispossessed, and subsequently sued for recovery of the lands, it was held that the period of limitation was to be calculated, not from the date of the purchase, but from

the time of dispossession. *Wise* v. *Bhoobun Moyee Dabea*, *W. R. Priv. Coun. III.* 5.

In the case of *Ajoudhya Pershad* v. *Bhikaree Pandah*, *W. R. III.* 176, it was observed that a purchaser at a private sale can not be allowed in instituting a suit to reckon limitation from the date of his purchase, and that if it were otherwise, limitation could not be applied at all, since every private purchaser would get a fresh start on every succeeding conveyance. Such a purchaser, therefore, must go back to the date when the original vendor's title accrued. The rule to be followed in the case of an auction purchaser at a sale for arrears of Government Revenue would seem to be different, *Shib Ram Chunder Mundul* v. *Pureeag Sing. W. R. III.* 165. In this case the plaintiff having sued for the reversal of an award made by the survey authorities, the defendant pleaded that the action was barred inasmuch as it had not been brought within three years of that award. But it was held by the lower court, and the decision was confirmed on special appeal, that as the plaintiff was no party to that award, but was an auction purchaser at a sale for arrears of Government Revenue subsequent to the award, the suit was not barred. Reference was made in this case to the decisions of the late Sudder Court, *S. D. D.* 1857, *p.* 1913, *S. D. D.* 1858, *p.* 470. and to the case of *Komul Kishen Surkhul* v. *Bissonath Chuckerbutty*, *W. R. Sp. No. p.* 128, decided by the full bench of the High Court. The principle upon which these decisions rest, is, that as all landed property comprised in the decennial settlement is considered as perpetually hypothecated to Government for the Revenue assessed thereon, a sale for arrears of Revenue transfers to the purchaser all the property and privileges which the engaging party possessed and exercised at the time of settlement, free, not only from subsequent encumbrances or transfers by the party engaging and those who claim under him, but also from the consequences of his or their omissions. For this reason a purchaser at a Reveuue sale does not claim under the person whose estate is sold and is not barred by a decree against the

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latter. See *Macpherson's Civil Procedure pp.* 54, 56. See also the case of *Rumonee Kant Bhuttacharjee* v. *Kalee Kant Chowdhry. W. R. III.* 217, and the decisions there cited.

In a suit to set aside an adoption by a Hindoo widow, defendant, the adopted son, pleaded limitation; but it was held that in absence of a distinctly recorded consent or acknowledgment by the adopting mother, or an authoritative assertion as against the plaintiff by the supposed adopted son of his title as proprietor, or a distinct recognition of and acquiescence in the alleged adoption by the plaintiff, no time can be fixed from which to reckon the period of limitation. *Sooburnomonee Dabea* v. *Petumbur Dobey. Hay's Rep. I.* 497,

The equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. *Rama Rau* v. *Raja Rau. Madras High Court Rep. II.* 114, *Peddamuthulaty* v. *N. Timma Reddy, Madras High Court Rep. II.* 270.

In the case of *Kullammal* v. *Kuppu Pillai,* the Madras High Court intimated an opinion, that the Indian law of limitation bars the remedy only, but does not extinguish the right, as was the case under the limitation statutes in England before the passing of 3 and 4 William IV. cap. 27, by the 34th Section of which it was expressly enacted that at the end of the period of limitation, the right and title of the party out of possession shall be extinguished,—a provision which is not to be found in the Indian Limitation Act. *Madras High Court Rep. I.* 85.

The bare possibility that the law as to the limitation of suits may ultimately become a bar to the recovery of assets, is not such danger of mis-appropriation as will warrant the granting to the Administrator General, an order under Section 12, Act VIII of 1855, to apply for letters of administration of the effects and estate of a deceased Hindu or Mahomedan. *Girdar Das Vallaba Das, Madras High Court Rep. I.* 234.

Where the plaint in a suit to establish a right to landed property and to recover arrears of rent, alleged no specific acts of

ownership since the year 1845, but contained a statement general enough to let in evidence of such acts, and it did not appear that the plaintiff had been questioned, it was held by the Madras High Court that the plaint should not have been rejected under Section 32, Act VIII of 1859 on the ground that it appeared to the court that the right of action was barred by lapse of time. *Udaya Varma* v. *Nayar Chambithu, Madras High Court Rep. I.* 322. In this case it was observed that while on the one hand the power conferred upon the court, under the section referred to, of considering at the outset whether limitation bars the claim, may have the effect of preventing objectionable litigation and saving expense, on the other hand, unless it be carefully exercised, the Judge may, upon mere partial preliminary statements, form an *ex-parte* opinion not warranted by a full knowledge of the facts. In the case of *Chetti Gaundan* v. *Sundaram Pillai, Madras High Court Rep. II.* 51, it was held by the Madras High Court, that although a plaint has been registered, the court may reject it, under Section 32, Act VIII of 1859, as barred by limitation; since it would be contrary to the plain intent of the Civil Procedure Code to hold that the mere ministerial act of registration deprives the court of the power, designedly given, of itself taking notice of the rule of limitation.

In a suit against a guardian for mismanagement of his ward's estate, it was sought to make him accountable for certain sums paid by him in discharge of debts which were barred by limitation, but the Court held that in the absence of any proof that the debts so discharged were fictitious debts, it was no ground for disallowing such payments, that limitation had run. *The Government* v. *Chowdhry Chuttarsal Singh. W. R. III.* 57.

All suits instituted since the 1st of January 1862 are to be governed by the provisions of Act XIV of 1859. Act XI of 1861, only postponed the operation of Act XIV of 1859 until the 1st January 1862, but after that date the new law of limitation had as full operation as if Act XI of 1861, had never been

passed *Mofussil S. C. Ct. References*, p. 138. *See*, also, the case of *Mohidin Sahib* v. *Khader Sahib*, *Madras High Court Rep. II.* 42.

SECTION 1. CLAUSE 1.

Limitation of one year. Pre-emption suits.

To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached.

IN the case of *Bibee Fatima* v. *Gossain Gobind Persaud*, *W. R. II.* 5, the defendant held certain lands under a conditional deed of sale. At the end of the term, notice of foreclosure was issued, and the year of grace having expired, the deed of sale was made absolute. As a third party was in actual possession of the land under a *zur-i-peshgee* lease, the defendant applied to have him ejected on payment of the amount due on his *zur-i-peshgee*. This application was granted and the defendant was put in possession. The plaintiff thereupon claimed the right of pre-emption, and it was found by the court that the usual legal preliminaries had been complied with. But it was contended by the defendant that, by the provisions of this Clause, the claim was barred, since it had not been preferred within one year from the date when defendant took possession. The court of first instance held that the defendant's possession dated from the expiry of the year of grace, when the sale became absolute, but the lower court of appeal was of opinion that by the terms of this Clause, actual taking possession was intended, and that as actual possession had not been obtained by the defendant until the ejectment of the party holding under the *zur-i-peshgee* lease, plaintiff's claim was made in time, having been made within a year from that date. On

special appeal to the High Court, it was held that the words "*taken possession*" in this Clause must be understood to mean an *actual* and not a merely *constructive* possession, and that a right of pre-emption must be enforced within a year from the time of the purchaser taking actual possession of the property in respect of which the right is claimed. It was observed that the object of the law is to give parties who have a right of pre-emption due notice of any transfer adverse to their interests, which can best be known by the fact of the new purchaser taking actual possession of his property, since if constructive possession were sufficient, it would be impossible for intending claimants to know of the existence of rights inimical to their own.

This view must however be received with some modification if the remarks of the Court in the case of *Bechun* v. *Mahomed Yakool Khan*, *W. R. III.* 225, are to be accepted as a correct statement of the law. In this case the court observed that where a purchaser is opposed in obtaining possession by some one asserting an adverse title, or, as in the case of *Bibee Fatima*, by a party who pleads that the purchaser has no right to take possession unless he discharges certain debts due from the vendor in consideration of which the objector alleges that he is himself in possession, and the purchaser is consequently prevented from acquiring any sort of possession in the property sold, the law of limitation may be cited to show that the claimant for pre-emption is required to sue within one year from the purchaser's taking possession under the sale impeached. But in a case where the only party who opposes the *khas* possession of the purchaser, is a mere farmer claiming to pay the same rent to the purchaser which he alleges that he has been paying to the vendor before the sale, it cannot be said that until the objections of the farmer, or other similar objections, are finally settled, the purchaser has no legal possession. In such a case the purchaser may, when suing to set aside the farm, sue also for possession, but it is only the form and not the fact of the

purchaser's possession which will then be in dispute ; and the provisions of the Clause under notice do not authorize that under such circumstances a claimant of a right of pre-emption should stand by until the respective rights of the purchaser and the party who opposes are finally determined. It is to be observed, however, that the remarks of the Court in this case are of the nature of *obiter dicta*, since the case was in fact decided upon the merits, it having been held that even if the plaintiff's right of action should not be considered to be barred by limitation, the evidence by which his claim was supported could not be believed.

A mortgage does not in any way affect the right of pre-emption, since the mortgagor still remains, in the contemplation of law, the owner of the mortgaged property. The right of pre-emption does not arise until the seller's right of property has been completely extinguished and cannot therefore arise where the seller has secured to himself any option or conditional power of dissolving the sale at a future time. No right of pre-emption can consequently accrue on a merely conditional sale or mortgage while any right of redemption remains in the mortgagor. *Gurudayal Mundur* v. *Teknarain Singh. W. R. II.* 215.

Section 1, Clause 2.

Limitation of one year.

Suits for damages, summary suits, &c.

To suits for pecuniary penalties or forfeitures for the breach of any Law or Regulation ; to suits for damages for injury to the person and personal property, or to the reputation ; to suits for damages for the infringement of copyright or of any exclusive privilege ; to suits to recover the wages of servants, artizans, or laborers, the amount of tavern bills or bills for board and lodging or lodging only ; and to summary suits before the Revenue authorities

under Regulation V. 1822 of the Madras Code—the period of one year from the time the cause of action arose.

WHERE a plaintiff, alleging that the defendants had entered his land, cut and carried away his growing crop of indigo plant, and converted and appropriated it to their own use, sued to recover the property so carried away and appropriated, or its value, and the defendants pleaded limitation under this Clause, it was held that the plaintiff's suit was not a suit for damages for injury to personal property within the meaning of this Clause, but was governed by the limitation prescribed in Clause 16 of this Section. *Saduk Mundul* v. *Watson & Co. W. R. Sp. No. p.* 126. A similar decision in respect of a suit for the recovery of the value of personal property plundered, and of other consequential damages, was pronounced in the case of *Huro Churn Pandah* v. *Sheik Ahmedoollah*, *W. R. II.* 235, in which reference was made to the case of *Saduk Mundul*, and to the case of *Juggobundoo Dutt* v. *Maseyk*, (*not reported,*) as clearly settling the rule of limitation to be applied. Wrongful seizure of goods under process of law is not an injury to personal property within the meaning of this Clause. *Inderchand Dogare* v. *Nundeeram Singh. Coryton's. Rep. I.* 3. This was an action to recover damages for the wrongful seizure by the defendant, under an execution, of certain logs of timber the property of the plaintiff, who alleged that partly owing to a fall in the market price, and partly to the exposure to the sun and immersion in water to which the timber had been subjected while under the seizure complained of, its value was greatly deteriorated. The defendant pleaded limitation under this Clause, as the seizure had taken place upwards of one year before the institution of plaintiff's suit; but the Court, following the ruling in the case of *Saduk Mundul*, was of opinion that the plea of limitation relied on by the defendant could not be maintained.

In the case of *Raj Chunder Ghose* v. *Joy Kishen Mookerjee* *W. R. 1V.* 76, the plaintiff sued for the value of paddy which might have been produced upon his land between the years 1267-1269, B. S. had not the defendant in the month of Falgoon 1266, cut a water-course by which the said land was overflowed, and the plaintiff thus prevented from sowing the usual crops. Among other pleas defendant pleaded that as the suit was one for injury to personal property and had not been brought within one year from the time when the water-course in question was cut, at which time the plaintiff's cause of action must be taken to have arisen, it was barred by limitation under this Clause. The court of first instance considering that crops, the produce of land, did not come within the category of personal property to which this Clause applies, and that as the suit was for compensation for the produce of land, the same period of limitation was applicable as in a suit for land itself, and finding that the plaintiff had actually sustained the damage complained of, gave a decree in his favour. Upon appeal it was held by the lower appellate court, that the suit was for damages to crops, that crops are personal property, and that therefore plaintiff's suit was barred by limitation under this Clause in respect of the years 1267 and 1268; but, as the cause of action was an annually recurring one, that the suit in respect to the crops of 1269, which was brought on the 10th February 1864,—29th Maugh 1270—was in time, inasmuch as the cause of action must be taken to have arisen on the 12th February 1863,—1st Falgoon 1269—when the plaintiff's crops for that year were prevented growing. On special appeal, plaintiff urged that the estimated value of the future produce of land, for which he sought compensation, was not personal property so as to come within the meaning of this Clause, and that under the circumstances he was entitled to the same period for bringing his suit, as he would have been allowed in a claim for real property. The Court was of opinion that the limitation provided by the Clause under notice, as it

refers only to personal property strictly so called, was not applicable to the claim. It was observed that the injury for which compensation was sought, was, in fact, the injury to the land, rendering it unable to produce certain crops, and thus causing it to be less profitable to the plaintiff than it would have been had the land not been so injured by the defendant's act, and that an injury of this nature cannot be regarded as an injury to personal property. The case was accordingly remanded for trial on the merits.

A suit for damages arising out of the tortious act of the defendant, a servant of the plaintiff, in not making payment of a sum of money which had been entrusted to him for a particular purpose, is not an action for damages to personal property within the meaning of this Clause, nor does it fall under the provisions of Clause 9, but under those of Clause 16 of this Section. *Sheikh Amjud Ali* v. *Syud Ali Buksh. W. R. II.* 122.

The word "servants" in this Clause must be taken to apply to all those between whom and some one else as employer, there subsists a contract for service in consideration of wages; and the provisions of the Clause must be taken to be generally applicable to all classes of servants, provided there be a hiring for wages for some stipulated time. *Kistomohun Roy* v. *Roop Chand Auddy. Decided 4th July* 1864, *on a reference from the Calcutta Court of Small Causes under Act IX of* 1850.

SECTION 1, CLAUSE 3.

Limitation of one year.

Suits to set aside sales under decrees or for arrears of Government Revenue, &c.

To suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by Royal Charter when such suit is maintainable; to suits to set aside the sale of any property, moveable or immoveable, for arrears of Government Revenue or other

demand recoverable in like manner; to suits by a Putneedar or the proprietor of any other intermediate tenure saleable for current arrears of rent or other person claiming under him, to set aside the sale of any Putnee Talook or such other tenure sold for current arrears of rent; to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other Officer of Revenue—the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought.

WHERE a subordinate tenure is sold in satisfaction of a decree, a suit to set aside the sale must, under this Clause, be brought within one year from the date of the confirmation of the sale, and no exemption from the rule of limitation can be allowed under Sections 9 and 10 of this Act, in favour of a party, who, without alleging that he was fraudulently kept in ignorance, pleads that he was not aware that the sale had taken place. *Rajkissen Mookerjee* v. *Gossain Dass Saha. W. R. I.* 213.

Section 246 of Act VIII of 1859, regulates the investigation of claims and objections to the sale of property attached in execution of decrees of Civil Courts, and provides that the order which may be passed by the Court after such investigation, shall not be subject to appeal, but that the party against whom the order may be given, shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order. Section 247 directs that where such claims and objections are designedly and unnecessarily delayed, they shall not be entertained by the Court. Where a claim to property about to be sold in execution of a decree was made under Section 246, and investigation into the claim was refused

under Section 247, it was held that the claimant in bringing a regular suit, was not restricted by the terms of Section 246, to institute such suit within one year from the date of the order disallowing the investigation. These two Sections cannot be read together to the effect of imposing the same period of limitation in cases where investigation is refused, as is provided in cases where it is allowed, since a claim which has been enquired into and decided stands in a different position from one in which the Court has refused to make any enquiry, or pass any decision. *Syed Mahomed Afzul* v. *Kanhya Lal*, *W. R. II.* 263. In this case it was also held, that inasmuch as the plaintiff did not sue either to set aside the sale, or the order made under Section 247 of Act VIII, neither Clause 3, nor Clause 5, Section 1, Act XIV of 1859 could be applied.

The following decision in respect of the period of limitation prescribed under Section 246, Act VIII of 1859, may also be noted. In December 1852, the property of A was attached in execution of a decree. B and C intervened claiming a portion of the property under certain deeds of assignment, and their claim was allowed by the court. In February 1857, D, at the sale of the same property in execution of the same decree, bought the right and interest of A therein, subject to the claim of B and C, of which he had notice. After his purchase D sued to set aside the deeds under which B and C claimed, as false and fraudulent, but on its appearing that the deeds were actual conveyances made by the elder sons of A after their father's death and during the minority of some of their brothers, the judge held that the suit was premature, inasmuch as the validity or invalidity of the deeds depended upon whether the minors' consent should be given to them, when they came of age. The minors having subsequently come of age, repudiated the conveyances, whereupon D again sued to have the deeds declared void as against him, and to recover the property which by the repudiation of the deeds by

the younger sons had fallen back into the estate of A purchased by him. The lower courts dismissed the suit as not brought within one year from the time when the intervenors' claim was allowed, and so barred by limitation under Section 246, Act VIII of 1859, but it was held on appeal that the provisions of that Section did not operate to take away any right of suit which the plaintiff possessed before the time when Act VIII of 1859 became law. It was observed that the words of the Section in question are prospective, and that there is nothing whatever to lead to the inference that the Legislature intended the Section to apply to past proceedings in execution. *Lokun Singh* v. *Deo Narain Sing. W. R. III.* 62.

In the case of *Sheikh Golam Nujee* v. *Beebee Suboorun W. R. II.* 55, some discussion took place as to the manner in which the rule of limitation provided under this clause, should be applied in suits to set aside sales in execution of decrees. The plaintiff sued for confirmation of his right and title in certain lands which the defendant alleged that he had purchased at a sale in execution of a decree against the plaintiff's wife. It was not shewn that the defendant after purchase had obtained possession of the estate in accordance with the provisions of Section 264, Act VIII of 1859, but it appeared that he had preferred a suit for arrears of rent against some of the ryots on the estate, and had obtained a decree notwithstanding the intervention of the plaintiff. The court of first instance, on the ground that the plaintiff's suit was a suit to reverse a sale of property under execution of a decree of a Civil Court, and that it was not instituted within one year from the date on which that sale became conclusive, dismissed the claim as barred by limitation under the provisions of this Clause. In the lower appellate court, it was held that by the provisions of Section 14, Act XIV of 1859, the time during which the plaintiff was occupied in prosecuting his right to the land in the rent suit should be taken into consideration, and that the claim was thus saved from limitation. The case having been brought before the High Court on special appeal, E. JACKSON J. was of opinion

that as it was not sought by the plaintiff to set aside the sale, both the Lower Courts were in error in applying Clause 3, Section 1, Act XIV of 1859 to the case. "The plaintiff," he observed, "alleges that the estate which has been sold belongs to him and that the debtor whose interest the defendant represents has no right, title, or interest in the estate; he admits that the sale was not in any way irregular, but that it was properly conducted in execution of a decree, and that the defendant purchased whatever right the judgment-debtor held in the estate; but he alleges that the purchaser bought nothing as the debtor held no such right. In such a case it is not necessary for plaintiff to sue to set aside the sale and he has not done so; he sued for confirmation of his right of possession in the estate, and the only question between the parties is that on the merits."

On the other hand, STEER J. was of opinion that if the defendant had been able to show that he had applied to the Civil Court to be put in possession of his purchase under Section 264, Act VIII of 1859, and that through the intervention of the court, acting under the provisions of that Section, he had actually obtained possession and had ousted the plaintiff, the latter would have been bound to bring his suit to establish his title to the land from which he had been dispossessed within one year from the date of the court's order giving delivery of possession to the purchaser; but as the defendant had not alleged or proved that the plaintiff was dispossessed in the above manner, the limitation of one year, which would apply where ouster had actually taken place under process of a Civil Court, cannot be pleaded. He further observed that "a party dispossessed, or sought to be dispossessed under a sale in execution of a decree has a right under the provisions of Section 269, Act VIII of 1859, to ask for the protection of the court to restrain the purchaser from dispossessing him; but if his opposition be set aside and the purchaser be put into possession, he must bring his regular suit to establish his title to the property from which he is dispossessed,

within one year from the date of the order by which he is dispossessed. But, if a claimant who resists the entry of a purchaser into property which the purchaser alleges he has bought under a decree, must, upon the court's deciding that he has no right to resist, bring his suit within a period of one year, so, *a fortiori*, must a party who stands by and allows the purchaser without resistance to take possession of his purchase. For although Section 264, Act VIII of 1859, does not say that a party ousted by an order of delivery passed by the Civil Court, must sue for the establishment of his title within one year from the date of dispossession under the court's orders; still, a party who tacitly permits himself to be put out of possession cannot be in a better position as regards the time when he ought to bring his suit to recover possession, than he who openly, though unsuccessfully, resists the right of the purchaser to deprive him of possession."

The opinion of STEER J. in the case of *Sheik Golam Nujee*, was followed by the Court in the case of *Ram Gopaul Roy* v. *Nundo Gopaul Roy*, *W. R. IV.* 42. This was a suit to set aside a sale of land in execution of a decree, so far as regarded the plaintiff's share. It appeared that the plaintiff had notice of, and was by his own admission dispossessed under colour of the sale which purported to be a sale of the property of the judgment-debtor. The plaintiff sued expressly to set aside the sale, and it having been found that more than a year had elapsed from the date of the sale, the suit was dismissed as barred by limitation. The plaintiff, however, appealed on the ground that his suing to set aside the sale was a mere verbal error, and urged that as in reality only the rights of the judgment-debtor had been sold, there was no occasion to set aside the sale, since all that he claimed was his own share of the property. The Court in delivering judgment, expressed itself to the following effect. "The question is whether a man dispossessed by the court under a sale in execution of a decree must sue within one year to reverse the sale proceedings, or whether he can, under the ordinary

law, sue for possession of the property any time within twelve years from the accrual of his cause of action. The object of the law is to give security to titles, by providing that a man who wishes to dispute the acts of the court must sue within one year. The test to be applied therefore is, was, or was not the act of the court the cause of the plaintiff's action. We think, that if it be shown that in fact the property was actually taken, and the plaintiff dispossessed by the court, whether the court was right or wrong, the injured party must sue within one year; but if this be not shewn, if according to the old loose practice a mere nominal and not a real possession was given,—as, for example, if the plaintiff was out of possession and not injured by the act of the court,—or if again the purchaser otherwise than through the court dispossessed the plaintiff,—then the plaintiff may under the ordinary law sue at any time within twelve years from the date when his cause of action, whatever that may be, arose, since under such circumstances, the sale, or any dispossession by the court, under the sale, is not the cause of action. In this case the plaintiff alleges that the property in dispute was attached and sold as property of the judgment-debtor, and that he was consequently dispossessed, but there is nothing in the record to show that the dispossession was the act of the court. The case must therefore be remanded for trial on that point. If the defendant can shew that real and substantial possession was given to him by the court, plaintiff is barred; but if not, he has the full term of twelve years within which he may sue, and the case must be tried on its merits." To the same effect may be cited, the case of *Kinoo Doss* v. *Roghoonauth Doss Mohaputtur*, *W. R. IV.* 34; and *Troyluckhonath Ghose* v. *Monohur Khan*, *W. R. IV.* 35. In the former case the plaintiff sued to set aside the sale of certain lands in execution of a decree whereby he had been dispossessed. The suit was not instituted until more than a year after the date of the dispossession, but the plaintiff contended that his claim should be held to be governed by the twelve years rule of limitation

provided by Clause 12, of this Section, and that therefore his suit was in time. The case having come before the High Court on appeal, it was held that although the plaintiff sued to set aside the sale, which he could not do after one year, his claim might be considered simply as one to recover immoveable property, and that as there was nothing to show that the plaintiff's dispossession had taken place under an order of a Civil Court, it was not necessary that in suing to recover his property he should sue to set aside the sale. The suit, as a suit for the recovery of immoveable property, was accordingly held to be in time having been instituted within twelve years from the date of dispossession. It was observed that where a court does not act up to the full letter and spirit of the provisions of Act VIII of 1859, so as to insure the settlement of disputes at the time of sale, but merely sells the right and interests in the old loose way, a party who may have no knowledge of these proceedings cannot be prejudiced, but has the full period of limitation. In the case of *Troyluckhonath Ghose*, certain land was attached as the property of A in execution of a decree. B and C intervened alleging that they had a two-third share in the land. The court of first instance finding that the intervenors and judgment-debtor were in joint possession ordered that only the judgment-debtor's right and interests should be sold, and as the rights of the intervenors would not thereby be affected, their petition was rejected. D, the purchaser, did not get possession at the time of sale, but sued subsequently for the possession of the whole land, alleging that as the above order was a decision under Section 246, Act VIII of 1859, rejecting the claim of B and C, they were bound to set it aside by a suit within one year, and that as they had not done so, his, D's, title was complete. The lower appellate court apparently admitting this plea, and also finding that the defendants had not proved their title, gave a decree for plaintiff; but on appeal it was held by the High Court, that, in disposing of the execution case, the lower court, clinging to the old practice, had clearly failed in its duty when

avoiding a decision under Section 246, Act VIII of 1859, it sold the undefined rights and interests. It ought then to have defined what share was possessed by the judgment-debtor, and what by the intervenors, and to have sold the judgment-debtor's definite share. This not having been done, the Court was of opinion that there had been no decision under Section 246, of which a purchaser by lying in wait without possession for one year, could take advantage, and that there being thus no pre-adjudication in the plaintiff's favour, it was for him to prove his title and not for the defendants, to prove theirs. The case was therefore remanded to try simply whether plaintiff had proved his title.

SECTION 1, CLAUSE 4.

Limitation of one year.

Suits to set aside attachments, &c., by Revenue Authorities for arrears of Government Revenue.

To suits to set aside any attachment, lease, or transfer of any land or interest in land by the Revenue Authorities for arrears of Government Revenue, or to recover any money paid under protest in satisfaction of any claim made by the Revenue Authorities on account of arrears of revenue or demands recoverable as arrears of revenue—one year from the date of such attachment, lease, or transfer, or of such payment as the case may be.

No case arising under this Clause appears to have been reported.

SECTION 1, CLAUSE 5.

Limitation of one year.

Suits to set aside summary decisions, &c.

To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is main-

tainable—the period of one year from the date of the final decision, award, or order in the case.

CERTAIN lands having been attached under a decree obtained before Act VIII of 1859 came into operation, A, a third party, claimed to be entitled, as against the judgment-creditor, under a deed of sale. The judge enquired into his claim, and finding that the assignment was fraudulent, ordered that the property should be sold under the decree. A suit which was thereafter instituted by A to set aside the sale and for recovery of possession, was dismissed by the lower court as barred by limitation, inasmuch as it had not been brought within one year from the date of the sale. On appeal it was contended for the plaintiff, that as the adjudication in the execution proceedings had taken place before Act VIII of 1859 was passed, these proceedings must be held to be governed by the law then existing, under which the powers of the Judge were confined to the determination of the question whether the judgment-debtor was, or was not in the actual or virtual possession of the property in dispute, and which conferred no right to deal with any question of title arising in the case, except for the purpose and to the extent of deciding that notwithstanding the claim made, the sale should proceed, and that consequently, as nothing was conveyed to the purchaser or guaranteed to him by the sale, beyond the rights and interests of the individual bound by the original decree, the suit now brought by A should be regarded simply as a suit for the recovery of immoveable property and so governed by the twelve years rule of limitation provided under Clause 12 of this Section; but it was held by the Court that the order of the Judge was a summary decision within the meaning of Clause 5, and that A's suit for the recovery of the property, having been instituted after the expiry of a year from the date of that order, was barred by limitation. *Sheikh Khyrut Ally* v. *Khurruck Dharee Singh. Marshall's Rep. I.* 520.

In the case of *Greedharee Doss* v. *Nundo Kissore Dutt. Hay's Rep. II.* 633, it was observed that the lower Court was wrong in holding that the period of limitation prescribed by this Clause does not apply to orders passed under Act XIX of 1841. (*for the protection of property against wrongful possession in cases of succession,*) and to the grant of a certificate under Act XXVII of 1860, (*for facilitating the collection of debts on succession &c.*). But in the cases of *Momeedunnissa* v. *Mahomed Ali, W. R. I.* 40, and of *Kanye Deyee* v. *Bipro Pershad Mytee, W. R. I.* 341, it was held that a regular suit to establish a right to a share in ancestral property in respect of which an application under Act XIX of 1841, had been disallowed, does not require to be instituted under this Clause within one year from the time when the application was disallowed, but may be brought at any time within twelve years from the date when the cause of action arose, since the Judge's decision under Act XIX of 1841, simply rules the right of possession, and is no bar to a regular suit, either by an unsuccessful applicant, or by a party evicted from possession under that Act. In the case of *Momeedunnissa*, it was observed that a similar decision had been given by the High Court on the 20th May 1864, in a case in which the question was, whether an action on the ground of inheritance brought after the lapse of a year from the date of an award under Act XX of 1841,* (*for facilitating the collection of debts on successions &c.,*) would lie or not, and it was held that it would lie. In the same case it was also observed that where the Judge who receives an application under Act XIX of 1841, refuses to entertain it, and refers the plaintiff to a regular suit, without even citing the defendant, his order is not such a decision or award as requires, within the meaning of this Clause, to be contested within one year.

A, having obtained a decree against B in the Rajshahye Court, sought to execute it in Jessore by attaching B's lands there. C, the son of B, claimed the attached lands as his own

* Repealed by Act XXVII of 1860.

by purchase from B, and obtained their release under an order from the Jessore Court. Within a year from the date of this order A sued B and C in the Pubna Court, reciting the proceedings taken for the execution of the decree in the Jessore Court, alleging that C's pretended claim by right of purchase to B's estate, having been notified to the Collector and all the Courts of the district, was an obstacle to his obtaining execution against B's property situated in Pubna and elsewhere, and praying that B's title to such property might be declared and the lands made liable to satisfy his, A's, decree. On this plaint being filed in the Pubna Court, inasmuch as the property therein mentioned was situated in different districts, application was made to the High Court for leave to proceed with the suit in the Pubna Court, but the High Court, directed that the suit should be transferred to the Dacca Court, as the bulk of the property lay within the district of Dacca. Instead of transferring the suit, the Pubna Court returned the plaint in order that it might be filed anew in the Court of the Principal Sudder Ameen of Dacca. It was not filed in the last mentioned Court until after more than a year from the date of the order for release, and it was afterwards again returned, and was lastly filed in the Court of the Principal Sudder Ameen of Furreedpore, within whose jurisdiction the chief portion of the lands mentioned in the plaint was found to be situated, and by whom the suit was dismissed as barred by limitation under this Clause, inasmuch as the plaint, having been returned by the Pubna Court, was not presented to the Dacca Court within a year from the date of the order made by the Court of Jessore for the release of the attached property. On appeal it was held, *firstly*, that in computing the period of limitation the suit must be taken to have been instituted on the day when the plaint was filed in the Pubna Court, notwithstanding that the requisite authority from the High Court to enable the Pubna Court to proceed was not eventually obtained; *secondly*, that if the suit were to be considered as brought by the plaintiff simply to set aside the

summary order of the Jessore Court releasing the attached lands, it ought to have been instituted in the Jessore Court, and no other, within one year from the date of that order, and in this view, not having been so instituted, it would be barred under this Clause; but, *thirdly*, that it is competent for a person who has obtained a decree, before he proceeds to execute it against his debtor's property, to institute a regular suit to set aside fraudulent conveyances by which his debtor's title may have been obstructed or rendered doubtful, and that the plaintiff's suit, regarded as one of this nature, was maintainable and brought within the time. *Takhuroodeen Mahomed Ehsan Chowdhry* v. *Kurimbux Chowdhry*. *W. R. III.* 20.

SECTION 1, CLAUSE 6.

Limitation of three years.

Suits to contest certain awards.

To suits brought by any person to contest the justice of an award which shall have been made under Regulation VII. 1822, Regulation IX. 1825, and Regulation IX. 1833 of the Bengal Code, or to recover any property comprised in such award—the period of three years from the date of the final award or order in the case.

THE enactments referred to in the text, regulate and define the powers to be exercised by the Revenue Authorities in the settlement of lands &c., and vest them with judicial cognizance in certain suits and claims relating to lands &c.

As this Clause re-enacts and supersedes Section 3, Act XIII of 1848, the following decisions on questions arising under that Section and Act, may be regarded as precedents with reference to the construction of this Clause. Where a petition for the amendment of a map was referred by the Deputy Collector to an Ameen for the purpose of making a local investigation, and the Ameen returned that as neither of the parties appeared

before him, he was unable to make the investigation, and the Deputy Collector thereupon struck the case out, it was held that the order of the Deputy Collector striking the case out, was not an award within the meaning of Section 3, Act XIII of 1848, and that the suit was not barred under that Section by the lapse of three years from the date of the Deputy Collector's order. *Gholam Koodsee Chowdhry* v. *Rashee Chunder Ghose. Marshall's Rep. I.* 323. The rejection by a Survey Officer of a claim to certain disputed lands, upon the ground that it was made too late, is not an award within the meaning of the provisions of Act XIII of 1848. *Shama Soondaree Dabea* v. *Prossonno Coomar Tagore. W. R. I.* 114. An order of a Superintendent of Survey striking off an appeal because the appellant did not file a copy of the decision of the Deputy Collector, and had delayed in filing his grounds of appeal, is not an award within the meaning of Act XIII of 1848. *Sham Kant Bannerjee* v. *Gopaul Lal Tagore. W. R. I.* 328. The decision of a Collector under the Butwarrah law, is not an award within the meaning of Section 3, Act XIII of 1848, since that Act applies only to awards made by the Revenue Authorities under Regulations VII of 1822, IX of 1825, and IX of 1833. *Greedharee Singh* v. *Pultoo Roy. Marshall's Rep. I.* 37.

An award of a Survey Officer adopting an order of a Magistrate passed under Act IV of 1840, is a legal award within the meaning of Act XIII of 1848, and cannot be set aside after the three years limitation prescribed by the third Section of that Act has expired. *Boroda Churn Bose* v. *Ramgutty Nag Chowdhry. W. R. I.* 120. In the case of *Rajkisto Roy* v. *Beer Chunder Joobroj, W. R. IV.* 100, the plaintiff alleging, that he had been for some time in possession of certain lands, and that during such possession, the defendant had obtained a survey award demarcating these lands as belonging to him and in his possession, sued to set aside the award and for a declaration as against the defendant, of his, plaintiff's, right to possession. It was held by the lower courts, that although the plaintiff's suit was brought

within three years from the date of the survey award, yet, inasmuch as that award was in strict conformity with a previous possessory order made in the year 1833, by a Magistrate under Regulation XV of 1824, limitation must be reckoned from the date of such previous order, and that reckoning from that date the suit was barred. On appeal, however, it was held by the High Court, that if the plaintiff's allegation of possession at the time of the survey award was true, his cause of action must be taken to have arisen from the date of that award and not from the date of the previous possessory order. The case was accordingly remanded for investigation on the merits. In the case of *Anund Chunder Roy* v. *Huro Nath Roy. W. R. I.* 329, plaintiff had sued in the Civil Court to establish his title to certain lands and obtained a decree. Subsequently the Survey Deputy Collector, on the ground that plaintiff's possession was only nominal, and that the defendants were really in possession of the lands, demarcated them to the defendants. Plaintiff suing for the reversal of this award, the defendants pleaded that the claim was barred by limitation under this Clause, on the ground that the suit had not been brought within three years from the date of the Survey Officer's orders; but it was held that as the plaintiff's title had been tried and established in a competent Civil Court, the proceedings of the Survey Authorities setting aside that decision, were of no force, and that the only law of limitation which could be applied to the case was the general one of twelve years.

Act XIII of 1848, applies only to suits for contesting the justice of an award, as between the contending parties, and is no bar to a suit by one who was not a party contesting before the Collector, for amending a settlement and establishing his right to lands. A decision by a Collector, in a claim brought by B, that certain lands belong to A and Z, and not to the estate of B, is no bar to a regular suit for the possession of these lands brought by C against A. The limitation provided under Section 3, Act XIII of 1848, is not applicable to such a case. *Komul Kishen Surkhul* v. *Bissonath Chuckerbutty. W. R.*

Sp. No. p. 128. See also the case of *Shib Ram Chunder Mundul* v. *Pureeag Singh W. R. III.* 165, in which the plaintiff having sued for the reversal of an award made by the Survey Authorities, the defendant pleaded limitation on the ground that the suit had not been brought within three years from the date of the award. It was, however, held that the plaintiff as an auction-purchaser at a sale for arrears of Government Revenue subsequent to the award, was no party to the award, and that his suit was consequently not barred. Reference was made in this case to the case last cited and to the decisions of the late Sudder Court in the cases of *Bhowanee Sunker Singh* v. *Bidaruth Koonwur, S. D. D.* 1857, *p.* 1913; and of *Bhowanee Singh* v. *Hur Dyal Singh, S. D. D.* 1858, *p.* 470, in which the same view was taken.

In a suit brought by the plaintiff as co-sharer in a joint undivided estate for possession of certain lands, it was pleaded that plaintiff was barred by limitation, inasmuch as the lands had been for more than three years in defendant's possession under a compromise resulting from a survey award of which notice had been served upon the joint proprietors of the estate. The plaintiff contended that as no notice had been given to him individually, and as he was not present, and so was no party to the award and compromise, he could not be bound thereby, and, consequently, the rule of limitation would not apply. On this view plaintiff obtained a decree in the lower appellate court. But, on special appeal, it was held that the notice of the survey proceedings to the joint proprietors, of whom plaintiff was one, was sufficient to make him a party to the proceedings, as it gave him an opportunity to attend and act, and that he was therefore bound by any award or compromise made in these proceedings, or as the result of them, in exactly the same way as he would have been bound by a joint *ex parte* decree after notice, and that his claim was consequently barred. *Sooruj Narain Roy* v. *Hur Lal Roy. W. R. III.* 7.

In a suit to reverse an award of the Revenue Authorities, defendant pleaded limitation under the provisions of Section 3, Act XIII of 1848, but as it appeared that the plaintiff during the period subsequent to the award, had been engaged in defending a suit, in which the defendant in the action for the reversal of the award was plaintiff, in which the title to the disputed property was involved and which terminated in plaintiff's favour, it was held that plaintiff was not barred by the provisions of the Section and Act referred to. *Maharajah Hetnarain Singh* v. *Fyaz Ally. Hay's Rep. II.* 50. This case was decided under the old law of limitation. It may be questioned whether under the provisions of Section 14, Act XIV of 1859, the time during which the other suit was pending could have been deducted in computing the time within which the suit for the reversal of the award of the Revenue Authorities should have been brought.

In the case of *Rumonee Soonduree Dossee* v. *Punchanun Bose, W. R. IV.* 105, it was held by the High Court,—reversing the decision of the lower court,—that in computing the period of limitation under this clause, the day on which the award was passed should be excluded. *Vide supra*, pp. 9-10.

SECTION 1, CLAUSE 7.

Limitation of three years.

Suits to recover property comprised in an order made under Clause 2 Section 1 Act XVI of 1838, or Act IV of 1840.

To suits by any party bound by any order respecting the possession of property made under Clause 2 Section 1 Act XVI of 1838, or Act IV of 1840, or any person claiming under such party, for the recovery of the property comprised in such order —the period of three years from the date of the final order in the case.

CLAUSE 2, Section 1, Act XVI of 1838, empowers the Revenue Courts of the Bombay Presidency to give immediate possession

of lands &c., to any person unlawfully dispossessed thereof, provided he apply within six months from the date of dispossession. Act IV of 1840,—for preventing affrays concerning the possession of land, and for providing relief in cases of forcible dispossession in Bengal ;—was repealed by Act XVII of 1862 but its provisions are, with certain modifications, embodied and re-enacted in Chapter 22, Act XXV of 1861. No period of limitation is provided by this last Act, within which suits for the recovery of property comprised in an order made under the Act, shall be instituted.

In the case of *Grish Chunder Chowdhry* v. *Bhageeruthee Dabea, Hay's Rep. II.* 541, plaintiff sued for possession of lands which were for some time under attachment in accordance with the provisions of Act IV of 1840, but which were eventually released in favour of the defendant. It having been proved that up to the time of the attachment plaintiff was not actually deprived of possession, it was held that limitation did not begin to run from the date of the attachment, but from the time when possession was finally given to the defendant by an order of of the Magistrate. Where during the pendency of proceedings in a case under Act IV of 1840, both parties were in possession, or both struggling for possession, it was held that limitation did not begin to run against either, before the time of final ejectment of one or other under the Judge's order. *J. Lyons* v. *Rajchunder Shikeressur Roy. W. R. II.* 162. A party seeking to disturb an award passed by the Magistrate under Act IV of 1840, must date his action, not from the Magistrate's decision confirming a previous possession, but from the actual date of dispossession. *Hurish Chunder Chowdhry* v. *Hüro Soonderee Dabea. W. R. II.* 300. Where a plaintiff has been dispossessed from certain lands by an award of the Magistrate under Act IV of 1840, he cannot, ignoring that award, and after the lapse of more than three years from its date, sue to establish his right to such lands, since had he sued to establish his right by the reversal of the award, the suit must have been brought

within three years. *Ameeroonissa* v. *Sheikh Jainooddeen Ahmed. W. R. II.* 182.

In the case of *Meernomoyee Dossee* v. *Ram Kaunye Gossamee W. R. II.* 49, the plaintiff sued to have an order passed under Act IV of 1840 set aside, filing her plaint on the very last day on which it was not barred by limitation under this Clause. In her plaint, she described herself as the widow of A deceased, and she shewed no title to the property in question, save as being the heiress and representative of A according to Hindu Law. The defendant pleaded that plaintiff had no right to sue, inasmuch as she was not the representative of her deceased husband, he having left sons who were alive and were his heirs. Upon this the sons, more than six months after the institution of the suit, filed a petition in which they declared that the plaintiff was in possession of all their father's property and had therefore full right to sue, and on that view plaintiff obtained a decree in the lower appellate court. But on special appeal it was held by the High Court that as the plaintiff had no title to the lands in dispute at the time she filed her plaint, and as the petition filed by the sons subsequently did not remove that defect in her case, her suit was barred by limitation.

Wrongful possession under an erroneous order of a Magistrate under Act IV of 1840, does not constitute such *bona fide* possession as will prevent the law of limitation running against the person so holding. *Ranee Luckhee* v. *Mooktokashee Dabea. Hay's Rep. I.* 306.

In the case of *Dyram Sahoo* v. *Beebee Sograh, W. R. III.* 174, the plaintiff sued to recover certain lands from which he alleged that he had been dispossessed by the defendant. The defendant pleaded limitation under this Clause and obtained a decision in his favour in the lower court. But it was held on appeal that inasmuch as there had been no final decision in the case instituted under Act IV of 1840, which had been struck off the file, the plaintiff's suit, which was brought within twelve years from the date of ouster, was in time.

SECTION 1, CLAUSE 8.

Limitation of three years.

Suits for goods sold by retail, suits for rent of buildings or lands, &c.

To suits to recover the hire of animals, vehicles, boats, or household furniture; or the amount of bills for any articles sold by retail; and to all suits for the rents of any buildings or lands (other than summary suits before the Revenue Authorities under Regulation V. 1822 of the Madras Code)—the period of three years from the time the cause of action arose.

THE operation of this Clause was suspended by Act XXXII of 1861, and subsequently by Act XIV of 1862, by which latter Act it is provided that "all suits that may now be pending or that shall be instituted before the 1st of January 1865, to recover the amount of bills for any articles sold by retail, shall, in all cases in which the cause of action arose before the passing of Act XIV of 1859, be tried and determined as if that law had not been passed."

In an action to recover the balance of an account for pearls sold by plaintiff to defendant, the latter pleaded that the suit was barred by limitation under the provisions of Clause 9, Section 1, Act XIV of 1859, inasmuch as it was not brought within three years from the time when the breach of contract constituting the cause of action took place, and as there was no written contract or engagement signed by the defendant or his duly authorized agent to bring the case within the exception provided by that Clause. The plaintiff replied that the goods were sold by retail, and as the cause of action in respect of the sale and delivery arose before the passing of Act XIV of 1859, that under the provisions of Act XIV of 1862, the suit was not barred. On this replication the defendant took issue, and it being proved that the plaintiff was a jeweller, and that the pearls were sold to the defendant to be worked up as ornaments

for his family, and not for resale, or to be dealt with as merchandize; it was held that the pearls were sold by retail within the meaning of this Clause, and that under the provisions of Act XIV of 1862, the suit was in time. A new trial was subsequently applied for on the following grounds; *first*, that the sale was not a sale by retail within the meaning of Clause 8, Section 1, Act XIV of 1859, and of Act XIV of 1862; *second*, that the effect of Act XIV of 1862, was to leave the period of limitation for all suits for the amount of bills for articles sold by retail, pending or to be instituted before the 1st January 1865, as it was before the passing of Act XIV of 1859, that is, subject to the English Law of Limitation, which, as *lex fori*,—*Beerchand Poddar* v. *Romanauth Tagore*; *Taylor and Bell's Rep.* 131,—would be applicable in such cases, and which prescribes six years as the period within which such suits should be brought; and that consequently plaintiff's replication ought to have contained an averment that the cause of action did arise within six years next before suit. The application for a new trial was, however, refused, the Court holding with reference to the first contention, that as the action was for the amount due upon a tradesman's bill for articles sold by retail to a customer in the ordinary course of business, the case came within the terms of Clause 8, Section 1, Act XIV of 1859, and of Act XIV of 1862, and not under Clause 9, Section 1 of the former Act. With reference to the second objection the Court observed that according to the rules of pleading, the plaintiff's replication afforded a good *prima facie* answer to the defendant's plea that the breach of contract took place more than three years before the institution of the suit, and that if it was meant to be contended that the suit was barred because the cause of action arose more than six years before suit, that was a matter to have been specially alleged by the defendant, and which the plaintiff was not called upon to negative by anticipation. *Buldeo Doss Johurry* v. *Sreenauth Sein. Indian Jurist Rep. I.* 114.

A suit for payment of the value of cloth, glassware, and other articles supplied, where the plaintiff acted as an ordinary trader and delivered the articles as they were required,—the claim not being one for the settlement of accounts between *Mahajuns* having mercantile transactions together,—was held to be governed by the provisions of this Clause. *Shama Churn Loll* v. *The Collector of Tirhoot. W. R. I.* 308.

Goods supplied to a dealer for the purpose of retail sale by him, are not articles sold by retail within the meaning of this Clause. *Mothoora Lall Paul* v. *Chrinebash Dutt. W. R. S. C. Ct. Cases. III.* 24.

Section 1, Clause 9.

Limitation of three years.

Suits for money lent or interest or for breach of contract where no written contract exists.

To suits brought to recover money lent or interest or for the breach of any contract—the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest or a contract in writing signed by the party to be bound thereby or by his duly authorized agent.

The provisions of this Clause are applicable to suits to recover remuneration under a contract for work and labour where there is no written engagement, and where the parties do not stand to one another in the relation of master and servant. *Carruthers* v. *Menzies. Coryton's Rep. I.* 40.

Where the plaintiff, a native artist, agreed to supply, and the defendant agreed to purchase pictures as ordered from time to time, subject to the approval of each picture by the defendant, the prices to be fixed upon delivery and acceptance,

and there was no contract in writing; it was held by the Madras High Court that a distinct contract became complete in respect of the pictures as they were from time to time delivered and approved of, at the price then fixed; and that the plaintiff's suit for the price of the pictures supplied by him was governed by the rule of limitation prescribed by Clause 9, Section 1, Act XIV of 1859, since the pictures were neither articles sold by retail within the meaning of Clause 8, nor could their price be considered to be the wages of an artizan within the meaning of Clause 2 of the same Section and Act. *Virasvami Nayak* v. *Sayambabay Sahiba. Madras High Court, Rep. II.* 6.

In the case of *Doyle* v. *Khooseal Khan, W. R. S. C. Ct. Cases, III.* 1. the defendant had had dealings in indigo with the plaintiff, without being his tenant, and his accounts were adjusted in his presence in 1859, when a balance of Rupees 62-5-8, was struck against him, and a fresh advance of Rupees 1-8-9, was made to him for the cultivation of indigo in 1860. Defendant having ceased to cultivate indigo in 1861, the plaintiff sued him in 1865, for the balance due on the advances made to him. Limitation having been pleaded, the case was referred for the opinion of the High Court, where it was held that immediately on striking the balance of Rupees 62-5-8, in 1859, that sum became a debt due by the defendant to the plaintiff on a simple contract to pay, for which the amount of the advances then ascertained to be owing was the consideration; that the subsequent giving of credit in respect of the ascertained balance and the farther advance, was also matter of simple contract between the parties; that on defendant's failure to fulfil his side of the contract, the law implied upon his part a binding engagement to pay back the money which he had received in faith of his undertaking to cultivate; and that whether the plaintiff's right to sue was technically referable to the defendant's breach of the contract under which the money was advanced, or to a contract to refund subsequently implied, in either alternative, the suit came within Clause 9,

Section 1, Act XIV of 1859 and not, as a case not expressly provided for, under Clause 16 of that Section; and that there was no ground whatever for holding that the parties to the suit stood towards each other in the relation of merchants who have had mutual dealings, within the meaning of Section 8, of this Act. An application for a review of judgment in this case was refused, *W. R. S. C. Ct. Cases, III*, 8, the Court intimating that even if the case were restated in the form desired by the petitioner, the judgment of the Court would be the same, and in the same terms as before.

In the case of *Doyle* v. *Edoo Gazee. W. R. S. C. Ct. Cases, III.* 13, the facts were closely similar to those in the case last cited. The defendant had received from the plaintiff, advances for the cultivation of indigo. Accounts were made up on the 9th January 1859, when a balance of Rupees 32-10-7, in plaintiff's favour, was struck in the presence of the defendant, who verbally admitted the correctness of such balance. On the 22nd December 1860, the account was again read over in the presence of the defendant, and was again admitted by him to be correct. Some time after the last date, four annas worth of indigo seed was advanced to the defendant. Plaintiff sued for Rupees 32-14-7, being the amount of the ascertained balance together with the new advance, instituting his suit some time subsequent to the month of January, 1865. The defendant pleaded limitation under Clauses 9 and 10, Section 1, Act XIV of 1859. It was held by the lower court that the provisions of these Clauses were not applicable to the case, but that it fell to be disposed of under Clause 16 of the said Section and Act, and, as the plaintiff's, cause of action must be taken to have accrued on the original adjustment of accounts in January 1859, that his suit was barred by limitation, not having been brought within six years from that time. The court further held that neither the verbal admission made by the defendant on hearing the accounts again read in December 1860, nor the subsequent advance of seed, were of any effect to prevent the bar, or to preserve any former

right of suit. On a reference to the High Court, the Judges were of opinion that "assuming that Clause 16, Section 1, Act XIV of 1859 governs the case, the lower court was right in holding that the suit was barred. The facts of the case do not admit of the application of Clause 9 of Section 1, and even assuming here a breach of contract within its provisions, this suit is not brought in due time, *viz.*, within three years from the time when the money became due, or the breach occurred." The court likewise held, as in the case last cited, that the dealings out of which the action arose, were not of such a nature as to bring the case within the provisions of Section 8.

In the case of *Doyle* v. *Allum Biswas*, *W, R. S. C. Ct. Cases, IV.* 1, the plaintiff sued to recover Rs. 81-0-7, alleged to be due by the defendant on an account stated on the 16th December 1860. Among other pleas, the defendant pleaded limitation. From the evidence, it appeared that in 1859, the defendant had received indigo seed to the value of Rs. 2-8-0, and that in 1860 he delivered one bundle of indigo. At the close of this latter year, the alleged adjustment of accounts, which was made the cause of action, took place. The accounts were not signed by the defendant, but the lower court was satisfied that the adjustment had taken place in the presence of the defendant, and that he had verbally admitted the correctness of the accounts. On this finding the court seems to have held, that six years was the period of limitation applicable to the case, and that plaintiff's suit having been instituted within that period, was in time. The case was, however, referred to the High Court for an opinion on the following point. "Is the verbal admission by a ryot of the correctness of the "account of an Indigo Factory,—*i. e.*, an account containing cross-items and fixing the balance due, furnished to "him by the Factory,—sufficient, without his signing such "account, to create or renew a fresh liability, with reference to the Law of Limitation, for items which would "have been otherwise barred by limitation." Upon this

reference, judgment was delivered by the High Court to the following effect. "If any new cause of action arose to the plaintiff, upon the alleged adjustment, the suit in respect of it, would be subject to the limitation provided by Clause 9, Section 1, Act XIV of 1859, and in this view the present suit, having been brought more than three years from the breach of contract then made, is wholly barred by limitation. (*Doyle* v. *Khooseal Khan.*) In respect, however, to the point referred, we think, that where two persons have dealings with each other like those which we understand to have passed between the plaintiff and defendant in this case,—that is, on the one side, advances of money or seed for the cultivation of indigo, on the other, delivery of the indigo grown according to the terms of the contract,—a mere verbal admission by the cultivator of the correctness of the account, has not the effect of creating, or renewing any liability with reference to the Law of Limitation. The old debt, if any, and the old limitation remain. If the debt is reduced by deducting, with the consent of the cultivator, the value of the indigo plant delivered, this deduction gives no new period of limitation to the right of suit for the balance. Nothing short of a written acknowledgment that the balance is due, has, under Section 4, Act XIV of 1859, this effect. But where the transaction between the parties terminates in a new and distinct contract relating to the balance of account as itself constituting a debt independent of the original items, the right of suit in respect of such contract, will have its own period of limitation, which should, of course, be calculated without reference to any prior right which may have existed. Whether such a contract has, or has not been entered into, is a pure matter of fact for the decision of the Court, and which may be established by oral evidence."

In the case of *Ram Narain Chowdry*, v. *Bhugwan Jogey*, *Mofussil S. C. Ct. References*, *p.* 92, the plaintiff a *mahajun* lent money to the defendant without receiving any written document. Payments were made by the defendant from time

to time which were deducted from the account, and a balance against him was eventually struck in his presence which he orally promised to pay to the plantiff with interest. More than three years after the date of the original loan, but within three years from the date of the alleged adjustment and oral promise, the plaintiff sued the defendant for the balance of the money lent, with interest. Defendant pleaded limitation, denying at the same time, that he owed any balance, or that he ever adjusted accounts as stated in the plaint. It was held by the lower court, and on reference by the High Court, that the case being a suit to recover money lent, fell to be disposed of under this Clause, and that when there is no written and signed acknowledgement, as provided by Section 4 of this Act, the mere fact of a payment having been made on account does not keep alive the claim so as to enable the creditor to bring an action after three years from the time when the debt became due; and further that there were no mutual dealings between plaintiff and defendant within the meaning of Section 8, to save the case from the general rule of limitation. It was observed by the Court, that in such a case the period of limitation provided by this Clause runs from the time when the debt became due, not from the date of the loan, and that in computing the period of limitation, the only point to be determined is, when the debt became due.

Considerable doubt has been entertained as to whether the rule of limitation prescribed by this Clause is applicable to suits arising out of wholesale transactions, and the decisions on the point are conflicting. In a petition presented under Section 297, Act VIII of 1859, for leave to sue in *forma pauperis*, it was stated that the petitioner's cause of action had accrued in respect of goods delivered to the defendant more than three years before the presentment of the petition, but that such cause of action was valid, since the transaction—for which a *hathchitta* containing the amount and prices of the goods had been signed by the defendant's partner—was a wholesale one. It was con-

tended for the petitioner that as the transaction was wholesale, the period of limitation applicable to the claim was six years, inasmuch as a distinction had been taken by the Legislature in framing the law of limitation between *wholesale* and *retail* sales, an express provision having been made for the latter, under Clause 8, Section 1, Act XIV of 1859, but no similar express provision having been made for the former, which consequently did not fall to be dealt with under Clause 9, Section 1 of the Act, but, in the absence of express provision, must be taken to be governed by Clause 16 of that Section. It was further contended that if it should be held that Clauses 9, or 10, indicated in a sufficiently express manner, the period of limitation for suits on wholesale transactions, so as to exclude the operation of Clause 16, still as the *hathchitta* signed by the defendant's partner must be regarded as a written contract, Clause 9, could not be applied to the case; and as Clause 10, had reference only to such written contracts, as might "by virtue of any law or regulation in force at the time and place of execution" be registered, and is silent as to written contracts which could not be registered, that Clause was also inapplicable, and the case again fell to be disposed of under the provisions of Clause 16. For the defence it was argued that the *hathchitta* was not a written contract within the meaning of Clause 10, but was to be regarded simply as a voucher for the delivery or order of the goods; that the case of goods sold wholesale was provided for by Clause 9, in a manner sufficiently express to exclude the operation of Clause 16, inasmuch as words of similarly large import in the English Statute, 21st James I, Cap. 16, Sec. 3, had been held to include actions for goods sold; and that in the case of *Buldeo Doss Johurry* v. *Sreenath Sein*, (*supra*, *pp.* 48-49,) it must have been taken as conceded that Clause 9 was inapplicable to a wholesale transaction, otherwise the plea filed in that case would have been demurred to, instead of being met by a replication based on Act XIV of 1862, suspending the operation

of Clause 8, Section 1, Act XIV of 1859, as to retail sales. The Court held that the document relied on was not a written contract within the meaning of Clause 10, but that the claim fell to be disposed of under Clause 9, and was consequently barred by limitation. *Chunder Churn Paul* v. *Ramnarain Sein. Coryton's Rep. I.* 8.

The same question, however, having been again raised before the same Judge—MACPHERSON, J.—in the more recent case of *Sonatun Goho* v. *Parbutty Churn Roy*, (reported in the *Indian Daily News*, August 25th, 1865,) a contrary view as to the period of limitation applicable to suits brought in reference to sales by wholesale was affirmed. The facts of the case are contained in the following judgment. "In the end of the year 1860, the defendant and another made certain wholesale purchases of rice. Becoming insolvent soon after, he in March 1861, verbally offered to pay the plaintiff one half of the whole amount due, the payment to be made in two instalments, one forthwith and the other within fifteen months. The first of these instalments was paid, and the plaintiff then joined other creditors of the defendant in signing a letter of license, a deed in which they bound themselves not to sue him, or to molest him in respect of their claims. This deed bore date the 8th March 1861. The plaintiff now sues for the remaining instalment. The defendant pleads limitation, and contends that the suit cannot be entertained as more than three years have elapsed between the execution of the letter of license and the filing of the plaint. But the plaintiff does not sue on the letter of license, for it contains no agreement, or contract as to the payment of these instalments. The plaintiff merely sues for a portion of the debt which accrued due on the original purchase, the right to which was not impaired by what occurred as to the letter of license. The question therefore is, whether the original claim is barred by lapse of time. The plaintiff says it is not, as it is a sale by *wholesale* and not by *retail*. The defendant says it is, and relies on a decision of my own—in *Chunder Churn*

Paul v. *Ramnarain Sein*,—in which I held that the period of limitation was the same, namely, three years, whether the sale was by retail, or wholesale. That decision is, I find, opposed* to a previous one of Mr. Justice Norman's—in the case of *Buldeo Doss Johurry*. Having now reconsidered the matter, and consulted with Mr. Justice Norman on the subject, I think that my former decision was wrong, and that the period within which suits must be brought for articles sold by wholesale is six, and not three years. The Act is exceedingly loosely and obscurely expressed, and does upon the face of it bear the interpretation which I formerly put upon it. On the whole, however, and bearing in mind that suits arising out of sales by retail are, under Clause 8, Section 1, Act XIV of 1859, limited to three years, I think it must be inferred, that the intention was that suits on sales by wholesale should have a longer term; and no specific term being prescribed, that such suits will fall to be dealt with under the general Clause 16 of Section 1, which fixes the period of limitation in all cases not specially provided for at six years." This decision will probably be followed until a definite determination of the question is obtained from the full bench.

The case of *Sheik Amjud Ali* v. *Syud Ali Buksh*, *W. R. 11.* 122, in which it was held that the limitation of six years, and not of one, or of three years, is applicable to an action for damages arising out of the tortious act of a servant in not paying

* It should be remarked in reference to this observation of the Court, that nothing appears in the published report of the case of *Buldeo Doss Johurry* which is in any way opposed to, or inconsistent with the view taken by the Court in the case of *Chunder Churn Paul*. In the former case, the plaintiff met the defendant's plea of limitation under Clause 9, by a replication, that the sale was by retail within the terms of Clause 8, Section 1, Act XIV of 1859, and that by Act XIV of 1862, the operation of the latter Clause was postponed until the 1st January 1865. This replication afforded a full and undoubted answer to the case set up by the defendant. It was, indeed, competent for the plaintiff to have pleaded generally that Clause 9, was inapplicable whether the suit arose out of a wholesale or a retail transaction, but there was nothing to compel him to take this more doubtful defence, and nothing can be inferred from his not having done so. The question as to the rule of limitation to be applied to suits arising out of wholesale transactions was consequently not before the Court in the case referred to, and the decision had strict reference to suits brought upon retail dealings.

over a sum of money which had been intrusted to him for a particular purpose, has already been noticed in the remarks on Clause 2, of this Section. A similar question of limitation was again raised in the case of *Radhanath Dutt* v. *Gobind Chunder Chatterjee, W. R. S. C. Ct. Cases, IV.* 19, in which the plaintiff sued the defendant, who had formerly been in his employment as his *gomastah*, or agent for managing his shop, for a certain sum of money received by him on plaintiff's behalf, and for which he had not accounted. The lower court, distinguishing the case, as being brought upon an implied contract, from the case of *Sheik Amjud Ali*, in which the cause of action was ruled to have been founded on tort, was of opinion that the defendant's omission to pay over, or account for the money received by him for his employer, was a breach of a contract within the meaning of the Clause under notice, and should be governed by the rule of limitation therein provided. The case was, however, referred to the High Court for an opinion as to what period of limitation is properly applicable in a suit by a principal against an agent for the recovery of money received by the latter during his agency, and not accounted for. Upon this reference the following judgment was given by the High Court. "Whether the servant or agent receives money from his employer with directions to apply it to a particular purpose, or receives money from a third person, being the proceeds of goods sold by the servant for his employer, the misappropriation of the money in both cases creates a right of suit of the same nature, and subject to the same limitation. The judge of the lower court conceives that the ground of action in the referred case is founded on an implied contract by the *gomastah* to pay over to the plaintiff the sum received from a third party, and that the case may therefore be distinguished from the decision of the High Court which is cited. The cause of action is, we think, esentially the same in both cases, whether it be described as a tort, or as arising on an implied contract. Clause 9, Section 1, Act XIV

of 1859, which provides a limitation of three years for suits brought "for the breach of any contract," seems not to apply to such a suit as the present, which may be considered to be founded, not so much on a contract in the sense in which that word is used in the 9th Clause, as on an obligation—created by law, and resembling a contract in many of its consequences,—which makes the defendant responsible for the money received by him from a third party, and misappropriated. The suits for breach of contract which are contemplated by Clause 9, are suits of a different description from the present, as is, we think, fairly to be gathered from the whole language of that Clause. No other provision of the law being applicable to the case, we hold, in conformity with the decision referred to, that the proper period of limitation is six years." See also as to the period of limitation in suits between principal and agent, *Syed Munsoor Ally Khan* v. *Rajah Prosonno Narain Deb*, *Coryton's Rep. I.* 25; and *Penuballi Subharamareddi* v. *Bhimaraju Ramaya. Madras High Court Rep. II.* 21.

A view similar to that taken by the Court in the case of *Radhanath Dutt*, has been followed in a variety of cases arising out of implied contracts. Thus it has been decided that the limitation applicable to a suit for contribution, or reimbursement, by a party who has paid the entire amount due under a joint decree payable by rateable shares, in which the cause of action may be taken to arise upon the breach of an implied contract on the part of those for whose benefit the payment was made, to refund the money so expended to him who paid it, is that of six years provided under Clause 16; *Doorga Mohun Doss* v. *Doorga Monee Dossee. W. R. II.* 266; *Nobo Kisto Bhunj* v. *Rajbullubh Bhunj*, *W. R. III.* 134; and, similarly, with regard to suits for mesne profits, in which the cause of action also arises on the breach of an implied contract, it has been held that the period of limitation is six, and not three years. *Lalla Gobind Suhaye* v. *Monohur Misser. W. R. I.* 65.

SECTION 1, CLAUSE 10.

Limitation of three years.

Suits for the same where there is a written contract which has not been registered within six months.

To suits brought to recover money lent or interest or for the breach of any contract in cases in which there is a written engagement or contract and in which such engagement or contract could have been registered by virtue of any Law or Regulation in force at the time and place of the execution thereof—the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.

ATTESTATION of a lease before a Cazee, is not a registration of it within the meaning of this Clause. *Nobonee Debea* v. *Doya Moyee Debea. W. R. I.* 89. It was observed in this case that the period of limitation to be allowed in a suit for money due under an unregistered written contract, is that of three years from the date of the breach of such contract. This observation, however, applies only to cases in which the unregistered contract could have been registered, in the terms of this Clause. For all registered contracts, and for all contracts which could not, by virtue of any Law or Regulation, be registered, the period of limitation is six years under Clause 16. *Chamur Ullah Sirdar* v. *Lokenath Holdar, Mofussil S. C. Ct. References. p.* 40. See also the decision of the Madras High Court in the case of *Velliapen Chetti* v. *Nootoo Thevan. Indian Jurist Rep. II.* 11. In the argument in the case of *Carruthers* v. *Menzies. Coryton's Rep. I.* 40, an unreported case was cited in which the High Court had held that the period of

limitation for a promissory note made in Calcutta, was six years under Clause 16, since a written contract of that nature could not, at the time when the note was executed, be registered there.

In the case of *Boystub Churn Doss* v. *Prem Chand Mitter*, *W. R. IV*, 98, plaintiff, the holder of a *hoondee*, sued the acceptor for payment, instituting his action within six years, but more than three years, from the date of acceptance. It was held by the lower courts, that the claim was barred by limitation, under the provisions of the Clause under notice, inasmuch as the *hoondee* on which the action was brought, had not been registered, although it might have been registerd under Regulation XX of 1812, * the fifth Section of which authorizes the Register of Deeds "to register bonds, promissory notes, and generally all "obligations for the payment of money; provided, however, that "such registry shall only be made on the application, in person, "or by representative, of the party to whom the said bonds, pro- "missory notes, or other obligations for the payment of money "may have been executed." On special appeal to the High Court the decision of the lower courts was reversed. It was observed that "while the regulation referred to continued in force, it was not, in practice, considered applicable to *hoondees*, or other similar negotiable mercantile securities, and the language of the section quoted, itself appears to show that such a document as that now sued on, could not have been contemplated by the framers of the Regulation. The *hoondee* on which the present action is brought, was drawn at Sylhet, and was addressed to, and accepted by the defendant at Manicktollah, in the 24-Pergunnahs, and is held by an indorsee. By the acceptance of the *hoondee* at the last named place, a written engagement, or contract was certainly made between the plaintiff as holder, and the defendant as acceptor; but this contract was one which could hardly have been registered by the person who executed it. Whether we assume the words of the Regulation to impose the task of registration of such a document on the

* Repealed by Act XVI of 1864.

drawer, or on the acceptor, they are inapplicable to the case of a mercantile security which is negotiable by usage. As the limitation of three years, under Clause 10, is therefore inapplicable, the suit must be remanded to the court of first instance for trial on the merits."

In the case of *Kadarsa Rautan* v. *Raviah Bibi. Madras High Court Rep. II.* 108, it was held by the Madras High Court, that a written instrument containing a promise to pay money lent with interest, and mortgaging certain lands as security for the amount, is a mortgage instrument, although possession be allowed to remain with the mortgagor, and consequently may be registered under Section 3, Regulation XVII of 1802,* of the Madras Regulations; and that where such an instrument has not been registered, a suit for the recovery of the money lent must be brought within three years pursuant to the provisions of this Clause. See, also, the case of *Chetti Gaundan* v. *Sundraam Pillai, Madras High Court Rep. II.* 51.

In all cases arising upon written contracts which, under the provisions of Act XVI of 1864,† operating from the 1st January 1865, may now be registered, and which are not registered, the period of limitation prescribed by this Clause will be applicable.

The case of *Chunder Churn Paul* v. *Ramnarain Sein*, cited *supra* p. 56, in the remarks upon Clause 9, decides that a

* Repealed by Act XVI of 1864.

† The proposed "Indian Registration Act, 1866," which is now—3rd February, 1866,—before Council, repeals Act XVI of 1864, but re-enacts it with modifications. Section 17 of the proposed Act, enumerates those instruments &c., the registration of which is compulsory; Section 18 enumerates the documents &c., the registration whereof is optional; Section 22 fixes a period of four months as the time within which instruments which must be registered shall be registered; Section 23 fixes a period of two months for registering documents of which the registration is optional; Sections 24, 25, 26 and 28 contain other provisions, relating to the time within which registration must take place; Section 27 provides that "In Act No. XIV of 1859, Section 1, Clause 10, the last clause shall be read as if for the words 'within six months from the date thereof,' the words 'within the time prescribed in that behalf by the Indian Registration Act, 1866,' were substituted. Section 52 provides that 'suits to recover money lent, or interest, or for the breach of any contract may be brought within six years from the time when the cause of suit arose, in every case in which there is an engagement or contract in writing, provided that such engagement or contract be duly registered under this Act.'

hathchitta containing the quantity and price of goods, is not a written engagement or contract within the meaning of this Clause.

Section 1, Clause 11.

Limitation of 12 years.
Suits for specialty debts and legacies.

To suits in cases governed by English Law upon all debts and obligations of record and specialties; and to suits for the recovery of any legacy—the period of twelve years from the time the cause of action arose.

No cases appear to have been reported which bear upon this Clause.

Section 1, Clause 12.

Limitation of 12 years.
Suits for immoveable property.

To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

The words "interest in immoveable property" as used in this Clause, must be taken to relate to an estate or interest less than the fee simple which a party may have in the *corpus* of any such property. A landlord's right to rents appropriated by a party in wrongful possession of immoveable property, is not an interest in immoveable property within the meaning of this Clause. The limitation prescribed by this Clause is consequently not applicable to suits for the recovery of mesne profits, which must be held to be governed by the rule of limitation prescribed in Clause 16 of this Section. *Lalla Gobind Suhaye v. Monohur Misser. W. R. I.* 65. But *see* the cases relating to mesne profits cited under Clause 16.

In the case of *Oodoyessuree* v. *Huro Kishore Dutt, W. R. IV.* 107, the plaintiff sued for possession of land from which he alleged that he had been dispossessed by the defendants, and for the opening up of a water-course which he alleged that the defendants had closed by constructing an embankment on the said land. The defendants pleaded limitation. The lower courts held, that the plaintiff's suit was not barred, and that his title was established, but disallowed his claim upon other grounds. The case having come before the High Court on appeal, the Court observed that the limitation prescribed by Clause 16, Section 1, Act XIV of 1859, was not applicable to the claim to have the water-course opened, since that was a claim "for an interest in immoveable property," and governed by the provisions of Clause 12 of the Section and Act referred to.

The limitation provided by the Clause under notice, is applicable to a suit to recover damages for injury done by the defendant to the plaintiff's lands, by cutting a water-course whereby the lands were overflowed and rendered incapable of producing crops. *Raj Chunder Ghose* v. *Joy Kishen Mookerjee. W. R. IV.* 76; ante p. 28.

In the case of *Chetti Gaundan* v. *Sundaram Pillai, Madras High Court Rep. II.* 51, the plaintiff sued for money due under a document securing a principal sum with interest, pledging certain lands for the payment of the amount, and providing that on non-payment within three years, the lands should become the absolute property of the pledgee. The plaintiff also asked that the property pledged might be held liable for the debt. The suit was dismissed by the lower courts as barred by Clause 10 of this Section, inasmuch as it had not been brought within three years from the period stipulated for the payment of the money; but on special appeal, it was held by the Madras High Court, that when land is hypothecated, the contract gives the creditor an interest in immoveable property within the meaning of Clause 12, Section 1, Act XIV of 1859,

and that the period of limitation for actions on such contracts is twelve years. The Court observed that "the words 'to which no other provision of this Act applies,' must be taken to relate to interests in immoveable property for which no other provision is specially made, since it would be difficult to contend that Clause 10 might not, *primâ facie*, apply to every interest in immoveable property arising out of a written contract. Clause 12, really applies to classes of interests not touched by Clauses 13 and 14 and other provisions of the same kind." It was also observed by the Court, that while the remedy of the plaintiff in this case was not barred so far as his contract was one of hypothecation, his concurrent remedy of an action for the money lent was clearly barred,—*Kadarsa Rautan* v. *Raviah Bibi*, *ante*, p. 63,—and that no redress could therefore be given him unless he proved, first, that there was an actual pledge of immoveable property, and secondly, that the property pledged was part of the estate of the debtor at the time of the pledge. On proof of this, the Court held that the proper decree was for the sale of the property hypothecated, unless the debtor paid the amount due with interest, within a period to be named.

Where a suit was brought upon a bond securing the payment of principal and interest, and the relief sought was that payment of principal and interest might be enforced, both as a simple contract liability, and as a debt secured by a collateral mortgage of immoveable property; it was held by the Madras High Court, that the suit was one for the recovery of an interest in land within the meaning of this Clause, and that the period of limitation was twelve years from the time when the debt became due. *Kristna Row v. Hachapa Sugapa, Madras High Court Rep. II.* 307.

Where plaintiff sued for possession of a share in a certain estate and defendant, the purchaser at an auction sale of the right, title and interest of A in the said estate, pleaded limitation, alleging that A had for upwards of twelve years been the sole apparent owner of the property; it was held that as according to a

will under which A held the property, it belonged not to A alone, but to him and the other persons named in the will jointly, it was to be presumed that A held for all persons interested therein, and not for himself alone, or adversely to the other persons lawfully interested, and that the rights of the plaintiff as a co-sharer under the will were consequently not barred by limitation. *Samuel* v. *Sheikh Moula Buksh, Hay's Rep. II.* 37. It may, however, be doubted whether in this case it was not in the first place incumbent upon the plaintiff to shew that A's possession was really a possession in plaintiff's behalf, and that the plaintiff, through A, had, within twelve years before the institution of his suit, been in actual or constructive possession or enjoyment of the estate.

Where a defendant pleads limitation by reason that the plaintiff has not had possession within twelve years before the institution of the suit, the first issue for trial is, whether the plaintiff was in possession within twelve years. A finding by the court that the plaintiff had possession "of late years," is not a distinct finding. *Bhugwan Chunder Nundee* v. *Kedar Nauth Acharjee. W. R. II.* 153; *see* also, *Ram Ruttun Roy* v. *Komul Narain Roy S. D. D.* 1860. *Vol. II.* p. 338. Where the plaintiff in a suit for possession alleges his dispossession from certain lands, the *onus* is upon him to show that he himself, or those through whom he claims, have actually been in possession within a period of twelve years before the institution of the suit. *Koonwur Nitrasur Singh* v. *Nundo Loll. W. R. Priv. Coun. Cases, I,* 51. In this case it was observed that no proof of anterior title in the plaintiff, such as would be involved in the decision of a question of boundaries in his favour, can relieve him of the burthen of proving that he was in possession within twelve years prior to suit, or shift it upon his adversaries, so as to compel them to prove the time and manner of plaintiff's dispossession. This decision has been followed in the cases of *Mohesh Chunder Paulit* v. *Kedarnath Mookerjee. W. R. I.* 67; *Nawab Nazir Sidhee Nuzeer Ali Khan* v.

Oomesh Chunder Mitter. W. R II. 75 ; *Surahutoonissa Khanum* v. *Mirza Mahomed Hossein. W. R. II.* 89 ; *Gooroodoss Roy* v. *Huronath Roy. W. R. II.* 246.

Under the old law of limitation the mere non-payment of rent to a landlord whose title has once been acknowledged, was held not to operate as an adverse possession on the part of the tenant so as to prevent the landlord from whom he derives his rights from instituting a suit for the possession of the land for which rent has been withheld, or to warrant the exclusion of the land, for which no rent has been paid, from the landlord's estate. It was observed by the Court that in this country the doctrine "once a tenant always a tenant" holds good, that no successful fraud, or omission of a legal obligation on the part of a tenant can convert a tenant's right in land which is admitted to have been within the estate of a proprietor, into a right of ownership, and that the statute of limitations can not be applied to such a case. *Dost Mahomed Khan* v. *Watson. Hay's Rep. II.* 4. To the same effect, *Sristidhur Mozoomdar* v. *Kalikant Bhuttacharjee. W. R. I.* 171. Limitation cannot be applied to the suit of a zemindar to recover possession of certain lands against a person alleging a *mourussee* title derived from another zemindar, until it be proved, that the holding through such other zemindar is a genuine one. *Sristidhur Mozoomdar* v. *Gopal Chunder Mundul. W. R. I.* 172. To the same effect *Huro Chunder Chowdhry* v. *Raj Luckhee Chowdhrain, W. R. I.* 172, in which case it was observed that where the real point in dispute is the validity of the subordinate tenure set up by the defendant, limitation is not applicable. But where the relation of landlord and tenant is not shewn ever to have existed between plaintiff and defendant, the payment by defendant of rent to another zemindar operates as an adverse possession to the plaintiff. *Rajah of Burdwan* v. *The Government. Hay's Rep. II.* 384. In a suit in which the plaintiff sought to recover possession of certain lands, and the defendant pleaded limitation, the lower court, treating defendant as a "squatter," overruled the plea,

upon the ground that as between a proprietor and a party in occupation of his estate, the law of limitation did not apply. But it was held on appeal that as it appeared from the evidence that defendant was a hostile claimant, alleging a proprietary right which she had endeavoured to make good by various litigations, her occupation of the lands in dispute for twelve years prior to suit without payment of rent, constituted good ground for the plea of limitation. *Kallynath Bhuttacharjee* v. *Lall Bebee Chowdhrain. Hay's Rep. II.* 487. In a suit to establish a right of possession to certain lands it was held by the court of first instance that inasmuch as the lands in dispute had been lying waste for a period of forty or fifty years, they had not during that time been in the possession of the plaintiff, and that his suit was consequently barred by limitation. But it was held on appeal that until there was adverse possession, there was no cause of action, and that consequently the suit was not barred if brought within twelve years from the time when adverse possession was actually taken. *Eshan Chunder Rai* v. *Kali Koomar Rai. W. R. II.* 135. To the same effect, *Doorga Soonderee Dabea* v. *The Collector of Rajshahye, W. R. II.* 210, in which it was held that in the case of jungle lands, no adverse possession, such as would properly admit of the application of the law of limitation, arises, until actual adverse possession is taken.

In the case of *Watson and Co.*, v. *The Government and others, W. R. III.* 73, various questions as to the applicability of the rule of limitation under this Clause to cases arising between landlord and tenant, and to cases in which a right to the possession of waste and uncultivated lands is sought to be established, received much attention. The facts in this case were as follows. Certain ghatwalee lands comprising an area of 35,955 beegahs which at one time formed a part of the permanently settled estate of Bishenpore, were in the year 1802, in consideration of a deduction from the revenue payable for the zemindary, made over by the Rajah of Bishenpore to the Government. Upon this transfer a separate jumma was fixed for the ghatwalee

tenure, which was recorded in the books of the Collectorate as a distinct estate. In the year 1839, the plaintiff at a sale for arrears of revenue, purchased the putnee talook, Lot Koooreah, which also had originally formed a part of the zemindary of Bishenpore. According to the allegation of the plaintiff, the ghatwals having encroached upon lands which were comprised within his putnee talook, and which had been possessed by former putnedars his predecessors, he demanded rent from them which they refused to pay; and subsequently in 1855, a Survey Officer demarcated the boundaries and prepared a map in which the lands in dispute, extending over an area of 3162 beegahs, and consisting partly of cultivated and partly of jungle lands, were described as belonging to the Government, and as included within the ghatwalee tenure. In 1856, the plaintiff instituted the present suit against the ghatwals and against the Government for the confirmation of his *mâl* right in the disputed lands, and for the reversal of the Survey Officer's order. The ghatwals pleaded limitation, alleging that the lands were their ghatwalee lands for which they had always paid quit-rent to Government as ghatwals, and that the plaintiff had not been in possession thereof within twelve years before suit. The Government took the same plea, and the defendants obtained judgment in their favour in the lower courts. On appeal to the High Court, it was held by two Judges—NORMAN, and E. JACKSON, J. J.—that if the lands in dispute formed a part of the zemindary of Bishenpore, and were not transferred as comprised within the ghatwalee lands to the Government in 1802, but belonged to the plaintiffs putnee talook, then upon the authority of the decisions in the cases *Koylashnath Roy* v. *Roop Singh Sirdar*, *S. D. D.* 1858, p. 1713; *S. D. D.* 1862, p. 234; *Koylashnath Roy* v. *Jugunnath Sirkar*, *S. D. D.* 1862, p. 292, limitation would not apply to the plaintiff's claim, since in these cases it had been decided that a ghatwal who in the course of years obtains possession, by encroachment, of *mâl* lands not originally included in his tenure, cannot as defend-

ant in a suit by the zemindar for assessment, or *khas* possession, plead limitation on the ground that the zemindar had not been in possession within twelve years; the general law of limitation not being applicable as against a zemindar in suits for the assessment of rent on lands within his zemindary; *Sheikh Shafaet-oollah* v. *Joy Kishen Mookerjee, VII Select Reports*, p. 499; *S. D. D.* 1850, pp. 158, 494; *Degumber Mitter* v. *Ram Soondur Mitter, S. D. D.* 1856, p. 617, in which last case it was held that where a zemindar sues for assessment, the cause of action is a continually recurring one. But even if these cases were not to be relied on, the Court was still of opinion that the mere omission on the part of the plaintiff for more than twelve years to take steps to assess the lands in dispute, or to have his *mál* right in them declared, would not necessarily bar the suit, since, according to the ruling in the case of *Gour Persaud Roy* v. *Moulvie Abdool Ali, S. D. D.* 1850, p. 491, the cause of action must be taken to have arisen, not from the time when the ghatwals first took possession without payment of rent, but from the time when such possession was adverse to the plaintiff; and here it did not appear, and could not be inferred that there was such adverse possession prior to the survey award demarcating the lands as ghatwalee, and consequently as held under the Government. The Court, however, observed that if it could be shewn that the ghatwal defendants had for twelve years been paying rent to Government specifically for the lands in dispute, and that the Government had at any time previous to the twelve years before suit asserted a proprietary title adversely to the plaintiff, the plea of limitation might be maintained; but even in that case, if it should appear that the lands were in fact a part of the permanently settled zemindary of Bishenpore, which was not transferred in 1802, and in respect of which, the Government receives a yearly revenue from the zemindar, the question would arise whether the Government as proprietor of the adjoining ghatwalee tenure, could plead limitation in a boundary suit as against the claim of the zemindar,—or of the

putneedar deriving his right from the zemindar,—to recover any portion of the permanently settled lands for which such revenue is paid, which may have been encroached upon by the ryots of the Government. It was, finally, observed by the Court that if the plaintiff had brought his action in another shape, and treating the ghatwal defendants as mere trespassers, had sued for possession and mesne profits, it would, according to the cases of *Mirtunjoy Paree* v. *Omesh Chunder Paul Chowdhry*, *S. D. D.* 1849, p. 411, and *Ram Chunder Paul Chowdhry* v. *Punchoo Mundul*, *S. D. D.* 1855, p. 253, have been a good answer to his claim, that the defendants had been twelve years in possession without payment of rent.

The case was accordingly ordered to be remanded for trial with reference to the views above indicated, and the lower court was directed, if it became necessary to go into the merits of the case, to enquire, not only whether the lands claimed were surrendered to the Government in 1802, but also whether they were ever included in the plaintiff's putnee talook. With reference to the question of limitation in respect of such part of the land as is, or was, wholly waste, unoccupied, or jungle, the lower court was instructed that it was not enough that it should be shewn that the plaintiff was not in possession, unless it were also shewn, or must be inferred that the lands were actually held, or a substantial claim asserted to them, by some other person. But as the views taken by the Court were at variance with the ruling in the case of the *Collector of West Burdwan* v. *Watson and Co.* *S. D. D.* 1860, p. 643, and as in the case of the *Rajah of Burdwan* v. *The Government*, *Hay's Rep. II.* 384, the points of difficulty arising in the present case had not been adverted to, leave was given to have the case re-argued before a full bench. The case was accordingly re-heard by a bench of five Judges.

On the re-hearing, NORMAN, C. J. remained of opinion, that limitation would not apply to the claim of the putneedar, if the lands in dispute were originally included in the decen-

nially settled estate of Bishenpore, and were not surrendered by the zemindar to the Government, under the arrangement made in 1802. SUMBHOONAUTH PUNDIT J. said,—With regard to the lands not under cultivation, no question of adverse possession can arise; but with regard to the cultivated lands, as the plaintiff has failed to prove his possession under the right derived from the zemindar, the law of limitation may properly be applied to his claim. The circumstance that the Government receives revenue from the zemindar, does not alter the nature of the case, nor shift the burthen which lies upon the plaintiff in this, as in every other similar case in which limitation is pleaded, to show that the lands have been held by him within twelve years before the institution of his suit. On plaintiff's failure to show this, there is no reason why the defendants should be called upon to disprove what plaintiff has not succeeded in proving. LOCH, J.—I see no objection to a farther investigation with regard to the jungle lands, because it is difficult to prove possession of such tracts, unless the proprietor has directly or indirectly exercised acts of ownership. With regard to the cultivated lands, I see no reason why the law of limitation should not be applied in this case as well as in any other case in which the plaintiff admits that he has been out of actual possession for more than twelve years. On the transfer to Government of the ghatwalee lands of Bishenpore they were entered as a separate mehal in the rent-roll of the district, and in fact became a separate estate. The ghatwals, holding these lands direct from Government in return for their services as police and the payment of a quit-rent, stand much in the position of talookdars under an independant zemindar. If a talookdar paying a fixed jumma to his zemindar, encroach upon the property of a neighbouring zemindar, he pays no increase of rent to his own landlord for land so acquired, and if the injured zemindar sleeps over his rights, and does not seek to recover possession within the period allowed by law, the talook-

dar and his zemindar may effectually plead limitation against him. Why should not the same rule be applied to the present case in which the plaintiff admits that he has not himself exercised any right of ownership over the lands in dispute, although he alleges that his predecessors have done so? The form in which this suit is brought is of no importance. In substance it is for recovery of possession, but instead of bringing his action directly in that shape, the plaintiff assumes that the lands are his, and that the defendant ghatwals are recusant occupants, and so sues to assess their tenures. Had the suit been brought in its present form against an ordinary zemindar, the law of limitation could have been as effectually pleaded as if the suit had been brought directly to recover possession. The Government holding the ghatwalee tenure in its own right has all the rights and privileges of an ordinary zemindar, and the law applicable to suits brought against the latter, is equally applicable to suits against the former. The present suit for assessment is simply an attempt to evade the law of limitation, and if successful now may be used in all cases. TREVOR. J.—Had all the land been under cultivation, and the zemindar in possesion, or had Government pleaded that it had, by the receipt of rents, exercised the right of ownership continuously over the whole of it, this possession being adverse to the plaintiff, it would have been for the plaintiff to show, that he had been in possession within twelve years prior to the date of suit, and failing in this, his suit must have been dismissed. But such is not the state of the present case. The Government pleader admits that the land in dispute is partly cultivated and partly jungle, and that he gets a quit-rent from the ghatwals for a large quantity of land; and that he is unable to say whether this is a portion of the land on which the quit-rent was fixed or not, that is, he is unable positively to assert an adverse possession to the defendant. As regards the uncultivated land, there seems to have been no possession accompanied by an exercise of the right of ownership in any

one, either in the plaintiff or in the Government; and the ghatwals' possession alone is not adverse to the plaintiff, they being under-tenants. It follows that for this portion of the claim the case must be remitted for re-investigation as to whether the uncultivated land formed a portion of the lands made over to the Government in 1802 or not. If it did, the plaintiffs' suit must be dismissed; if it did not, he must obtain a decree. As regards the cultivated lands, since the Government is unable to assert that the lands are those on which the quit-rent of the ghatwals was fixed and consequently those on which it has continuously exercised the right of ownership, the mere fact of the ghatwals having taken possession of, and cultivated them, cannot, by limitation, bar the right of either zemindar. In this state of things it seems that on the pleadings no application of the Statute of Limitations can be made, but that this portion of the case as well as that regarding the uncultivated lands must be tried upon its merits, the real issue being, are the cultivated lands in dispute within the putnee estate of the plaintiff, or within the ghatwalee estate of Government as settled in 1802? If the plaintiff can prove what he alleges, that his predecessors in the putnee always collected rent from these lands, that will go far to establish his title to them, as, on the part of Government, it is not asserted that these particular lands have ever been subjected by it to assessment.

Mr. Justice Levinge, one of the five Judges before whom the case had been heard, having died without delivering judgment, the case was again referred to a full bench for re-hearing, when the following judgments were delivered.

SIR BARNES PEACOCK C. J.—It is an important question, not only as regards the Government, but also as regards the ghatwals, whether in respect of lands which the latter claim to have held as part of their ghatwalee tenure, they are now to be called upon to pay, in addition to the quit-rent, a rent to the plaintiffs as putneedars, on the ground, that the lands in dispute

form a portion of the plaintiffs' putnee talook. If the plaintiffs can make out that the ghatwals did pay rent to their predecessors, such payment as against the ghatwals would be evidence that the lands in respect of which the payment was made, were part of the plaintiffs' putnee talook. But as the ghatwals could not legally transfer the right to the lands, if they really were part of the ghatwalee estate, from the Government to the putneedars, by paying rent to the putneedars in addition to the quit-rent paid to the Government, the mere fact of such payment having been made by the ghatwals would not be conclusive evidence as against the Government. Two issues therefore will have to be tried; *first* whether the ghatwal defendants, or those under whom they claim, paid rent for any, and, if any, for what part of the cultivated lands in dispute to the plaintiffs or their predecessors in the putnee estate; *second*, whether the cultivated and uncultivated lands in dispute or any, and what part of them formed part of the plaintiffs' putnee estate. As to the uncultivated lands, it is said that the defendants are not in possession; but the survey shows that they are in possession, and that those lands are a part of the ghatwalee lands, and the action being to set aside the award made in that survey, there is a *prima facie* case in the defendants' favour. Although it may be difficult in many instances to prove the actual possession of jungle lands, it is still possible to do so. The marks of possession with regard to property depend on the nature of the property, and it is not necessary in order to prove possession, to prove an actual bodily continuous possession. The exercise of such acts of ownership over jungle lands as would ordinarily be exercised over property of that nature would be evidence of possession. For instance if it were proved that the ghatwals were in the habit of cutting or preserving the wood, gathering wax, or wild honey, collecting sticks, lac, &c., such acts, might be evidence of ownership or possession; and those who have to deal with the facts of the

case would have to determine whether such acts were referable to the right of property or possession, or were acts referable to a mere right of easement independent of possession. As therefore, there may be possession of uncultivated, as well as of cultivated land, the question must be tried, as a *third* issue, whether the ghatwalee defendants were in possession from the year 1839, or for a period exceeding twelve years next before the commencement of this suit; and, as a *fourth* issue, whether if they ever had possession of the uncultivated lands or of any portion of them, they ever paid rent for them to the plaintiff or his predecessors. I should add that a tenant cannot prescribe against his land-lord according to the English Law or the Civil Law, nor, as I understand, according to the law as laid down in the Sudder Decisions. TREVOR J.—I see no reason to alter the opinion expressed in my former judgment. It appears to me that the case should be referred to the lower court for inquiry on only one point, *viz.* with whom is the title to the lands in dispute, with the plaintiffs or with the defendants? The only party who could plead an adverse possession to the plaintiffs is the Government; but it has never set up an adverse possession, and the mere fact of the ghatwals having been in possession as tenants cannot entitle them to do so. LOCH J.—I still adhere to the opinion that the suit is barred by limitation. The plea set up by the Government and the ghatwals together, is a valid plea; and as the plaintiffs admit, that as regards the cultivated lands they have exercised no rights of ownership for more than twelve years, they cannot bring their action to recover. With regard to the uncultivated lands, however, there is not the same admission made; and therefore I think the case may go back again for the question of possession to be retried as proposed by the learned Chief Justice. If plaintiffs' possession within twelve years be proved, it will go far to prove his title. NORMAN J.—I adhere to the opinion which I originally

expressed in this case; but with reference to the arguments which have since taken place, it is necessary to add, that when the case was before the Court on the last hearing, it was admitted on the part of Government, that the Government had not received rent specially for the lands in dispute from the ghatwal defendants who were in possession. For the purpose of the plea of limitation, it must be assumed that these lands are within the limits of the decennially settled estate of Bishenpore. When a person holds lands within a zemindary, but not under a zemindary title, in order to sustain the plea of limitation against the zemindar suing to assess, he must show a possession adverse to the zemindar. If he is a mere ryot, his possession is not adverse. Again, as a mere squatter he cannot plead limitation. If the plea of limitation could be pleaded successfully, it would be on the ground that from a twelve years possession it could be inferred that a rent-free tenure had been created within the zemindary. But such a grant if actually made would be invalid, and contrary to Section 10, Regulation XIX of 1793. That, I believe, is the true ground of the decisions in cases like that of *Sheikh Shafaetoollah* v. *Joykishen Mookerjee, VII Select Reports*, p. 499; and in the case reported *S. D. D.* 1850, p. 188, that the general law of limitation is inapplicable to the case of a person who proceeds to assess rent against another holding under an alleged invalid rent-free tenure. In these cases and in *Degumber Mitter's* case, it was said that the cause of action was a perpetually recurring one. I think that principle applies to the persons who are now found occupying lands within the zemindary of Bishenpore. They themselves could not plead limitation in a suit to assess and declare the land to be *mâl* lands. I think it makes no difference that they are holding adjacent lands under the Government. They say that the lands are within a zemindary, belonging to the Government. Are they or are they not? That is a simple issue. It may be, as a

general rule, that encroachments are to belong to the estate of the landlord under whom the encroaching tenant holds. But that is a presumption capable of being rebutted. It is by no means clear that there is such a presumption in favour of the landlord as against a stranger, *Doe dem Baddiley* v. *Massey*, 17 *Q. B.* 376. The Zemindar of Bishenpore, being liable for the payment of Government revenue in respect of the lands of his zemindary, the case is exactly the same, as if a contract existed with the Government. The Government cannot be entitled to claim revenue, and at the same time to plead adverse possession as against the zemindar in respect of these lands for which such revenue is paid. The Government never did, in fact, assert any adverse title by taking rent for, or specifically asserting a claim to those lands as against the zemindar. Had the Government actually asserted an adverse title to the lands as being part of the ghatwalee lands more than twelve years ago, the question would have been different. SHUMBHOONATH PUNDIT, J.—With respect to the cultivated lands, so long as it is not shewn that the ghatwals were the ryots of the plaintiffs or of their predecessors, they have a right to plead adverse possession and limitation as against the plaintiffs. If the ghatwals have held the lands in dispute *as ghatwals*, the Government is entitled to plead their possession as adverse to the plaintiffs. But if the plaintiffs can prove—and the burden of proof is on them,—that they or their predecessors received rent from the ghatwal defendants now in possession, or from their predecessors, then adverse possession and limitation cannot be pleaded, since those who have once held as tenants cannot be considered to hold, whether for themselves or for others, adversely to their former landlord. As regards the uncultivated lands, it is for the defendants to prove, that they have so possessed them as to make their holding actually adverse to the plaintiffs.

The case was remitted to the Zillah Judge, with directions to place it on his own file, so that, if it should be necessary, it

might come before the High Court as a regular appeal, and be heard and determined as well on questions of fact as of Law.

Section 1, Clause 13.

Limitation of 12 years.

Suits for shares in joint family property and for maintenance.

To suits to enforce the right to share in any property moveable or immoveable on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance as the case may be.

Many of the cases arising under this Clause have been decided with reference to the presumption which obtains under the Hindoo Law of the continuance of the joint right to ancestral property in the members of a joint and undivided Hindoo family. This presumption throws upon the party alleging separation at a certain time, and claiming property as separately acquired after that time, the *onus* of proving the separation, and the separate acquisition. Accordingly, where it is admitted that a Hindoo family is joint and undivided, the mere fact of property standing in the name of one member of the family is not *primâ facie* proof that it is his separate self-acquired property, nor is his possession *primâ*

principles which they lay down, would seem to apply equally to the new law of limitation.

Where a plaintiff as reversioner sued to recover lands which a Hindoo widow had during her occupation wrongfully made over to a third party, it was held that limitation did not run against him from the date of the act which he sought to set aside, but from the death of the widow, and—as the plaintiff was at that time a minor—from the time of his attaining majority. *Seeboo Persaud Doss* v. *Mussamut Afrunissa. Hay's Rep. II.* 477. On the death of a Hindoo widow who had alienated property in which she had only a life interest, the reversioner sued to have her alienations set aside. It was contended for the defendant, in whose favour the alienations had been made, that the plaintiff's title had accrued during the lifetime of the widow, under a deed of gift from her upon which he had sued and been nonsuited more than twelve years before the action to set aside the alienations was instituted, and that consequently the claim was barred by limitation. The Court held that the plaintiff's title as reversionary heir was distinct from that accruing under the alleged deed of sale, and that in respect of his reversionary title, limitation ran only from the death of the widow. *Anund Mohun Roy* v. *Chunder Monee Dossee. Hay's Rep. II.* 648.

A Hindoo widow putting forward a pretended deed of gift from her husband, sold to the defendant lands in which she had only a life interest. Her son disputed the deed, and was directed by the Court to institute a regular suit for setting aside the sale, which, however, he failed to do. The son pre-deceased the widow, but his children after the widow's death, within twelve years after they attained majority, but more than twelve years after the sale to the defendant, instituted a suit as reversioners for the recovery of the lands. Limitation was pleaded by the defendant, but it was held that as no possession by or through a Hindoo widow, however it may have been acquired can be adverse to the reversioner until his right to possession

accrues, which does not happen until the death of the widow, the claim was not barred. *Peary Mohun Roy* v. *Chunder Kant's Roy. Marshall's Rep. I.* 33. A reversioner who during the lifetime of a Hindoo widow seeks to set aside a sale made by her, must institute his suit within twelve years from the date of the sale. But the rule of limitation which would apply to a suit by a reversioner during the lifetime of a Hindoo widow to set aside a sale by her after the expiry of twelve years, does not affect the right of the reversioner to sue when he succeeds as heir upon the widow's death, since he is then entitled to the property in a different capacity with reference to which his right of action must be taken to arise from the death of the widow. *Mohendro Nauth Bose* v. *Munshi Syed Amir Ali. W. R. II.* 271.

Lands held by a Hindoo widow were sold in execution of a decree against her for her personal debts. The purchaser failing to pay the Government Revenue on other lands held by him, these, together with the lands purchased under the decree were sold by the Collector at an auction sale to the defendant. A reversioner—the widow being then alive—sued to have this sale set aside, but the suit was dismissed as not brought within one year from the date of the sale as prescribed by Section 24, Act I of 1845 * On the death of the widow, a suit for possession being brought by the same plaintiff, limitation under the said Section and Act was again pleaded by the defendant; but it was held on appeal that as all that was, or could be sold under the original decree was the widow's life interest in the lands, nothing more than that life interest could be purchased by the defendant at the sale for arrears of revenue; that on the widow's death the defendant's interest in the lands through her terminated; and that neither the provisions of the Act referred to, nor the decision in the former suit could bar the plaintiff's suit for possession. *Doorga Churn* v. *Kassee Chunder Moitree. Hay's Rep. II* 646.

* Repealed by Act XI of 1859.

Where a plaintiff sought to recover possession of certain lands sold in satisfaction of decrees against his adoptive mother, alleging that as she was dead and had held only a life interest, he had a right to take possession, the defendants, auction purchasers, pleaded limitation under Clause 3, Section 1, Act XIV of 1859. It was held that on proof that what had been sold in execution of the decrees was merely the life interest of the adoptive mother, the Clause on which the defendants relied would not constitute a bar to the plaintiff's claim, although his suit was not brought within one year from the date of the execution sale. *Ramlall Sirkar* v. *Greesh Chunder Lahooree. W. R. I.* 145; *see* also, *Mohendronath Bose* v. *Motee Soondaree Dossee, W. R. II.* 271. Where after the death of a Hindoo, or of his widow, his daughter is entitled to succeed, but does not get possession, the sons of the daughter are entitled to sue for possession within twelve years of their mother's death, and to require the period of their minority to be deducted in computing the period of limitation as prescribed under Section 11, Act XIV of 1859. *Kummul Sha Bennick* v. *Ramjee Sha Bennick. W. R. II.* 276. In the case of *Wooma Churn Bunnerjee* v. *Haradhun Mozoomdar, W. R. I.* 347, the plaintiff's cause of action as reversioner was held to accrue on the death of his grandmother, who had the life interest.

Gour Dyal with the consent of his three sons Ramdeen, Gouree Sunkur and Sheo Pershad, alienated certain ancestral landed property in a district in which the Mithila Law prevails. After the death of Gouree Sunkur, his son Soetul together with Nursing and Surgessur the sons of Sheo Pershad, instituted a suit for declaration of their title in the said ancestral property, and to set aside the alienations of their grandfather Gour Dyal, as made without legal necessity and without their consent. As against the first two plaintiffs, the defendants pleaded limitation, on the ground that their suit had not been brought within twelve years from the date of the alienations, nor within three

years from the time when these plaintiffs attained majority. With respect to the claim of the third plaintiff Surgessur, who was still a minor at the time the suit was instituted, the defendants urged that as the alienations had taken place before he was born, he had no right of action. The plaintiffs, on the other hand, contended that as their grandfather Gour Dyal, whose illegal acts they sought to have declared invalid, was still alive, limitation would not apply to their claim, and with respect to Surgessur's right of action they maintained that by the Hindoo law an unborn son has a right of action as much as sons born, since all are equally entitled to support. The lower courts having dismissed the plaintiff's claim, the case came before the High Court on special appeal. The judgment of the High Court on the issues of limitation is somewhat vaguely worded, but it would seem to have confirmed the opinion expressed by the lower appellate court that the plaintiff's cause of action must be considered to have arisen at the time when the alienations took place; that, subject to the usual exemption by reason of minority, limitation must be reckoned to have run from that time; and that the running of the period of limitation was in no way affected by the circumstance that Gour Dyal was still alive. It was observed by the court that "the analogy of the right of a reversioner arising on the death of a Hindoo widow was not applicable to such a case, since in the case of the widow the reversioner's rights are inchoate only, inasmuch as it cannot be known until her death who will have that legal *status*, while there can be no dispute as to the legal heirship of sons and grandsons." In respect of the claim of the minor Surgessur, it was observed by the Court that the doctrine of the Hindoo law that an unborn son has a right of action as much as sons born, since all are equally entitled to support, "merely inculcates a duty in the family and a right in certain relations to the ancestors," but "does not apply to the operation of the law of limitation so as to give a perpetual cause of action." With

reference to this ruling, it is to be remarked in the first place that if the plaintiffs, instead of instituting their suit during the life time of their ancestor, had sued after his death to reverse the alienations made by him without their consent, then in accordance with the decisions of the late Sudder Court in the cases of *Ramdyalnarain Singh* v. *Syud Joolfeekur Hosein*, *S. D. D.* 1851. *p.* 352, and of *Sheosuhy Singh* v. *Gobind Roy*, *S. D. D.* 1857, *p.* 67, limitation must have been computed from the date of the ancestor's death, and not from the date of the alienations. In the second place it is submitted with reference to the claim of the minor Surgessur, that the real issue for the Court to have determined was whether alienations made before his birth, gave Surgessur a right of action at all. If they did, then that right of action could only be taken from him by the operation of the ordinary rules of limitation. If the alienations did not under the circumstances afford such right of action, then there was nothing upon which the rules of limitation could operate. *Seetul Pershad Singh* v. *Gour Dyal Singh*. *W. R. I.* 283.

SECTION 1, CLAUSE 13.

Limitation of 12 years.

Suits for shares in joint family property and for maintenance.

To suits to enforce the right to share in any property moveable or immoveable on the ground that it is joint family property ; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge ; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management

of such property or estate on account of such alleged share, or on account of such maintenance as the case may be.

A PRESUMPTION obtains under the Hindoo Law of the continuance of the joint right to ancestral property in the members of a joint and undivided Hindoo family. This presumption throws upon the party alleging separation at a certain time, and claiming property as separately acquired after that time, the *onus* of proving the separation, and the separate acquisition. Accordingly, where it is admitted that a Hindoo family is joint and undivided, the mere fact of property standing in the name of one member of the family is not *primâ facie* proof that it is his separate self-acquired property, nor is his possession *primâ facie* an adverse possession as against the other members of the family. The following cases, some of which were decided before Act XIV of 1859 came into operation, will show how this presumption has been applied.

Where the plaintiff sued for the share of his maternal grandfather in the family property, and the defendant pleaded limitation, and it appeared that the parties had all lived together as members of an undivided Hindoo family, the plaintiff's immediate predecessors being females, it was held that there could be no such adverse possession as would support the plea of limitation. *Rojonee Kanth Mitter* v. *Premchand Bose. Hay's Rep. I.* 513. To the same effect, *Doyamoyee Dabea* v. *Bhobosoondaree Dabea, Hay's Rep. II.* 65.

In deciding an issue under the old law of limitation in a suit for a share of a joint inheritance, the lower court found that the plaintiff had not given evidence of her possession up to the date of suit, and decided the issue against her. On appeal it was held that such a finding was inconclusive, the real issue being whether the plaintiff was a joint sharer, and if so, whether the joint possession continued up to any time within twelve years next before the commencement of the action. *Indur-*

monee Dabea v. *Rajnarain Chand Mozoomdar. Marshall's Rep. I.* 172 ; *W. R. Sp. No. p.* 52. A Hindoo widow having sued to recover from her husband's brother, her husband's share in a joint estate, the lower court assuming that she had been dispossessed from the death of her husband which took place more than twelve years before the institution of her suit, considered that the suit was barred by limitation. But it was held on appeal that as it appeared that the parties had been living together as belonging to the same family, there was no presumption of an adverse holding by the defendant, or of the plaintiff's dispossession. The case was accordingly remanded for a decision on the evidence as to whether what was joint property when plaintiff's husband died, had since, by any act of the defendant—either by dispossession of the widow, or by holding adversely to her without recognition of her right,—been acquired by the defendant, and whether he had so held for more than twelve years. *Kistomonee Chowdhry* v. *Sibchunder Chowdhry* ; *Hay's Rep. I.* 473 ; *Marshall's Rep. I.* 196. In the case of *Bindoo Bashinee Dossee* v. *Anund Chunder Paul, W. R. II.* 179, the plaintiff, a Hindoo widow, sued for possession of her husband's share of joint property inherited from his grandfather. It was found by the court of first instance that plaintiff had been in joint possession with the defendant within twelve years before the institution of her suit, as she had within that time been living in his house and messing with him, but the lower appellate court considering these facts insufficient to prove plaintiff's joint possession, dismissed her suit. It was held by the High Court on appeal that the proof given by the plaintiff of her *status* in the defendant's household was sufficient to establish her joint possession.

Kaleenath died leaving his mother Kripa Moyee and his sister Huro Soondaree, but no child or widow, him surviving. Kripa Moyee held possession of his property until her death, when Huro Soondaree took it and remained in possession until she too died. Upon Huro Soondaree's death, the son

of her husband by another wife attempted to get possession, but Biressur, claiming as collateral heir of Kaleenath, recovered it from the son of Huro Soonduree's husband. Subsequently, Onooda standing in the same relation as Biressur to Kaleenath, sued as a co-heir of Kaleenath, to recover from Biressur his share of Kaleenath's estate. Biressur, amongst other pleas, pleaded limitation, but the lower courts over-ruled this plea, and on the merits gave a decree in favour of the plaintiff. The defendant, on special appeal, contended that the plaintiff's cause of action accrued on Kripa Moyee's death, which was admitted to have occurred more than twelve years before the institution of the suit, and that the evidence that Huro Soonduree's possession was not adverse to the plaintiff was legally insufficient. The plaintiff, on the other hand, urged that Huro Soonduree's possession had been properly held not to be adverse to him, and that being so, that his cause of action did not arise before her death which admittedly took place within the period of limitation ; and further, that the recovery of the property by the defendant as heir of Kaleenath must enure to the benefit of his co-heirs, and consequently that the plaintiff's cause of action first accrued when Biressur set up a title adverse to him. It was held by the Court that as it did not appear that Biressur in his suit to recover from the son of Huro Soonduree's husband pretended to act on behalf of any other person than himself, or even knew of the existence of his co-heirs, the recovery of the property by him in that suit did not affect the running of the period of limitation as against the plaintiff. The Court further declared that as possession of property must always be attributed to a right to the property of the largest possible kind on the part of the person possessing it, until it be shewn either that the possessory right really is in another person and that the actual enjoyment is by his permission, or that the possession, although of right, is so under some limited right to the property, the possession of Huro Soonduree must *primâ facie* be presumed

to be of right in herself, and adverse to all the world ; and that as there was no evidence to rebut that presumption, the plaintiff's cause of action must be taken to have arisen on Kripa Moyee's death, and so to be barred by limitation. *Onooda Churn Banerjee* v. *Biressur Banerjee*. *W. R. III.* 12.

In the case of *Drobomoyee Burmonea* v. *Bhuggobutty Dabea*, *Hay's Rep. II.* 470, which was decided under the old law of limitation, the plaintiff sued for possession of a share in certain lands, stating in her plaint that she and the defendant were joint proprietors of the lands claimed, and that from a certain date the defendant had prevented her from collecting her share of the rent of the said lands. The defendant admitted that the property had formerly been joint, but alleged a private partition, under which the disputed lands were included in his share. He pleaded that as under that partition he had been in undisturbed possession of the lands for forty years, the suit was barred by limitation. The court of first instance, considering the alleged partition not to be proved, gave judgment for the plaintiff. The lower appellate court reversed this decision on the ground that as the plaintiff had not proved her dispossession at the time alleged in the plaint, the presumption was in favour of the defendant who declared the land to have been in his possession for more than twelve years before suit. On special appeal to the High Court, it was contended for the plaintiff that the *onus* had been thrown upon the wrong party. The Court held that on the defendant's failure to prove the alleged partition, it was for him to show how the plaintiff's claim was barred by limitation, since the party setting up the special plea of limitation is bound to prove it. It may, however, be doubted whether this decision is rested upon correct grounds. The principle laid down by the Privy Council in the case of *Koonwur Nitrasur Singh* v. *Nundo Loll*, (*ante* p. 67,) is that where a plaintiff sues to recover possession of lands from which he alleges his dispossession by the defendant, the *onus* is upon

him to show that he has actually been in possession within twelve years before bringing his suit. In the case of *Drobomoyee Burmonea*, the plaintiff was discharged of that *onus* when it was established that the property was joint, it being then presumable, until the contrary should be shewn, that the holding of the defendant was not a holding for himself alone, but also for the benefit of the plaintiff. In this way the burthen of proof came to be thrown upon the defendant, not in consequence of the general rule referred to by the Court, that a plea of limitation must be established by the party who advances it, but in consequence of the legal presumption that property which has existed as joint property remains joint until separation be established.

The question as to the party upon whom the *onus* of proof lies in a suit for a share of joint family property was discussed in the case of *Ombika Churn Sett* v. *Bhuggobutty Churn Sett*, *W. R. III.* 173, and the decision in that case may seem somewhat to modify the view above indicated. The plaintiff sued for a share in certain family property which he alleged to be joint. The defendant, conceding the plaintiff's right to a share in other portions of the family property as actually held joint, denied his right to any share in the particular property which formed the subject of litigation, as being the defendant's own acquisition. It was admitted by the plaintiff, that he had separated in mess from the defendant more than twelve years before suit, and the lower court considering that it was clear on plaintiff's own admission that he had had no possession in the disputed property within twelve years, dismissed the claim as barred by limitation. On special appeal it was urged that the ordinary presumption in respect to a joint Hindoo family, threw the *onus* of proving separate property upon the party alleging a separate right. But it was pleaded for the defendant, and held by the Court that inasmuch as the Clause under notice expressly provides that a suit to enforce a share in joint family property must be brought

within twelve years of possession or enjoyment, the *onus* in such cases is in the first place upon the plaintiff to prove a joint-possession or enjoyment of the property within twelve years The Court, however, observed that as it was stated by the plaintiff and his witnesses in their evidence that the plaintiff received three rupees a month as one of the family up to a period within twelve years of the date of suit, and as such payment if established would save limitation in the terms of the Clause under notice, a plea to that effect urged by the plaintiff on appeal, though not directly taken in the written grounds of appeal, should be admitted. It was accordingly ordered that as the lower appellate court, considering that the plaintiff's statement if true was no proof of possession, had not disposed of the plea, the case should be remanded for enquiry into the truth of the alleged payment.

In the case of *Ranee Shama Soondaree* v. *Jardine, Skinner and Co*, *W. R. III.* 144, the plaintiff, a co-sharer in a joint estate, sued her co-sharers and their lessee to recover her joint possession of certain lands belonging to the estate. The plaintiff's co-sharers did not themselves dispute her claim, but the lessee, without denying the plaintiff's averment that she was a sharer in the joint estate, pleaded that as he had held the lands for twenty years as lessee under the other co-sharers, and as the plaintiff had not been in possession at any time within twelve years before the date of suit, the action was barred by limitation. On it appearing that the plaintiff had sued the same defendants in a previous action in which she had alleged a separate right under a partition in the lands in dispute, and that in that suit the defendants while disallowing her claim to exclusive possession, had recognized her as one of several co-sharers in joint possession of the estate, the lower court over-ruling the plea of limitation gave judgment for the plaintiff. From this decision the lessee appealed, contending, *first*, that as he was the lessee of the plaintiff's co-sharers and of their shares only, he stood in relation to the plaintiff in the position of a tres-

passer, and as such could plead adverse possession as a bar to the plaintiff's suit; *second*, that as he had been for more than twelve years in pos-ession of the lands in dispute as tenant under a lease granted to him by the plaintiff's co-sharers when they were in sole possession, and as within that time the plaintiff had brought no suit to establish her own right, or to question the act of her co-sharers, or to disturb the appellant, the right to do so had lapsed and the appellant could not be turned out of possession of the plaintiff's share so long as his lease lasted; *third*, that as he had held the lands for twenty years from and under the plaintiff's co-sharers, in whom alone he had reason to believe that the estate vested, paying them the full stipulated rent, he was equitably entitled to continue his occupancy on the original terms, as tenant of the plaintiff jointly with the other co-sharers. In respect of the *first* plea it was held that as it had not been contended in the lower court, nor in the written grounds of appeal that the appellant was in adverse possession of the plaintiff's share as a trespasser, that plea could not be raised in the appellate court for the first time. With reference to the *second* plea it was held that a proprietor in a joint estate could only be barred by limitation, if those who are his co-sharers dispute his claim, and can show that they have dealt with the estate for twelve years as their own exclusive property and so as utterly to destroy the presumption that they were acting as managers or trustees for the whole body of proprietors, since, before a party avowedly a sharer can be held to be barred from establishing his rights as such, an adverse possession distinctly indicating separate proprietorship must be pleaded and proved by the co-sharers, and unless they plead it, one who is merely a lessee under them is in no position to take the objection. With reference to the *third* plea, it was held that as the appellant had never pleaded a right in the nature of a right of occupancy to continue his tenancy under the plaintiff as a joint landlord, but had all along denied that the plaintiff

had any right or title in the land, he could not be permitted after the plaintiff's right was established to turn round and say, "I recognize your right, but you are bound to acknowledge me as your tenant, and as having been so for a long past period."

In the case of *Surnomoyee Dabea* v. *Gunga Gobind Roy. W. R. II.* 264, the plaintiff as widow of one Ram Gobind, on behalf of herself and minor sons, sued certain members of her deceased husband's family for a share of joint ancestral property from which she alleged that she had been ousted. As it appeared that the father of Ram Gobind, through whom the plaintiff alleged that her claim was derived, when sued during his life time as trustee for the defendants' father then a minor, for misappropriation of the funds of the estate in dispute, did not plead that he was a joint sharer and not a trustee, it was held, that although there is a legal presumption that a Hindoo family admittedly once joint, continues joint until the contrary be proved, and the burthen of proof rests with those who aver a separation of rights, still in this case the presumption had been *primâ facie* rebutted so as to shift back upon the plaintiff the burthen of proving that she had possession and was dispossessed within twelve years previous to suit.

The plea of limitation is not applicable to a suit brought by a member of a joint Hindoo family for a declaration of his title to certain lands belonging to the joint estate, and in certain temples built thereon by another co-sharer. *Kissorynath Chowdhry* v. *Hurrokanth Chowdhry. W. R. II.* 183. It was observed in this case that a claim to an exclusive use of temples and the like, standing upon *ijmali* land, would imply a possession and enjoyment of a nature not consistent with the rights of a Hindoo sharer of joint property; and that even if an exclusive possession in the temples could be established, a co-sharer would still be entitled to a declaration of his joint right in the land on which they stand.

In the case of *Kundurp Narain Singh* v. *Bundoo Ram Sein*, *W. R. Act X Cases, III.* 6, the plaintiff had originally sued in the Collector's Court under Act X of 1859, for the arrears of rent of certain lands occupied by the defendants; but on the latter pleading that they held the lands for which rent was claimed under a partition, the plaintiff's claim was dismissed. The plaintiff then sued in the Civil Court to have his right and title to the lands declared, admitting the defendants to be co-sharers with him in the general estate, but alleging that with respect to the particular lands in dispute, the defendants were only in the position of ordinary tenants, and as such were liable for rent. The claim brought in this shape was held by the lower courts to be barred by limitation under Section 77, Act X of 1859, as not brought within one year from the date of the Collector's decision; but on special appeal it was held by the High Court that Section 77 of Act X of 1859, which has reference only to cases in which a third party intervenes, was not applicable to a case in which there had been no intervention. Further it was ruled that the suit was not barred under Clause 5, Section, 1, Act, XIV of 1859, since that Clause referred to suits for the reversal of the decisions of other courts, whereas the present suit was not brought to set aside the Collector's decision, but was an original suit to obtain a declaration of title by setting aside plaintiff's plea of partition. The Court held that to such a suit the period of limitation prescribed by the Clause under notice is to be applied.

In the case of *Ruj Coomaree Dabea*, v. *Gopaul Chunder Chatterjee*, *W. R. IV.* 101, the plaintiff sued for possession of a joint share in certain lands which she claimed by right of inheritance from her deceased father, alleging that she had been in joint possession thereof from the date of his death in 1238, until 1267, B. S., when she was dispossessed by the defendants, her co-sharers. The defendants denied that the plaintiff had ever been in possession of the land claimed, which they alleged that they held under a will. The court of first instance dismissed

the claim as barred by limitation on the ground that the plaintiff had never been in possession since her father's death; but the lower appellate court held that until the defendants proved the will under which they claimed to hold, no question of limitation adverse to the plaintiff could be entertained. The case coming before the High Court on special appeal it was held that the judgment of the lower appellate court was erroneous. The court of first instance having tried the point whether the plaintiff had ever had joint possession of the property, and having decided against her on that point, the lower appellate court before going farther, should have tried the same issue, and have determined it with reference to the provisions of Clause 13, Section 1, Act XIV of 1859. The Court at the same time observed that as there was no allegation in the pleadings that the family was separate, or that the property in dispute was not ancestral, if the plaintiff had been able to prove her possession either personal or constructive at any time within twelve years before the institution of her suit, the question whether the will was, or was not genuine could not have arisen.

In the case of *Luckhee Monee Dabea*, v. *Binode Lal Chatterjee*. *W. R. IV.* 84, the plaintiff, a Hindoo widow, sued for maintenance. The defendants the brothers of the plaintiff's deceased husband pleaded that as more than twelve years had elapsed from the death of the plaintiff's husband before the institution of the suit, the claim was barred by limitation under the provisions of Clause 13, Section 1, Act XIV of 1859. It appeared from the evidence that the plaintiff's husband had died more than twelve years before the institution of the action, also that he had pre-deceased his father, who had died within two years before the date when the suit was filed. The case having come before the High Court on special appeal, it was held that the mere fact of more than twelve years having elapsed between the date of the death of the plaintiff's husband and the date when her plaint was filed, did not bar her remedy

under the Clause cited,—inasmuch as her husband having predeceased his father, her maintenance, although a charge on the property in the father's hands, was not, so long as the father lived, "a charge on the inheritance of any estate." The Court was of opinion that when the property went from the father to his heirs, the plaintiff's maintenance then first became a charge on the inheritance, and that therefore plaintiff had twelve years from the death of the father within which she might bring her action. This view is perhaps open to question, and the language in which the decision is expressed is not very clear.

The only bar to the enforcement of a right to arrears of maintenance is the lapse of the time required by the law of limitation to bar the remedy. The right to maintenance is a constantly recurring right, and there is no authority for saying that a woman entitled to maintenance must to obtain the sum to which she is entitled bring annual actions. *Venkopadhya* v. *Kavari Hengusu. Madras High Court Rep. II.* 36.

SECTION 1. CLAUSE 14.

Limitation of 12 years. Suits by proprietor of land to resume or assess Lakheraj or rent-free land.

To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any Lakheraj or rent-free land —the period of twelve years from the time when the title of the person claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued. Provided that in estates permanently settled no such suit, although brought within twelve years from the time when the title of such person first accrued, shall be maintained if it is shown that the land has been held Lakheraj or rent-free from the period of the permanent settlement.

Proviso if the land has been held rent-free from the time of the permanent settlement.

THE original Regulations for the decennial settlement of the public revenues of Bengal, Behar, and Orissa, were passed for these provinces respectively on the 18th September 1789, the 25th November 1789, and the 10th February 1790. The revenue assessed upon the lands of these provinces under the above Regulations was declared fixed for ever by Regulation I of 1793, passed by the Governor General in Council on the 1st May, with effect from the 22nd March of that year.

The words "rent-free" used in this Clause, are not used in contradistinction to "lakheraj," but merely as showing the meaning, or giving the English of the word. It has been held that the Clause only applies to cases in which a title as lakherajdar is in dispute, and consequently was not applicable to a case in which the plaintiff sued to establish his right to assess certain beegahs of land held by the defendant in excess of the number specified in a mokururee pottah granted prior to the permanent settlement to those through whom the defendant claimed; which extra beegahs defendant contended that he had a right to occupy without enhancement of rent, as forming part of the lands covered by the pottah, and as such possessed by him and those through whom he claimed for more than sixty years. *Nobin Chunder Roy Chowdhry* v. *Janokee Bullub Chuckerbutty. W. R. Act X Cases. II.* 33.

Where a plaintiff sued for possession of certain lands which he claimed as belonging to his zemindary, and which he alleged were falsely declared by the defendant to be lakheraj, the lower court on a finding that the land was purchased by the defendant's ancestor as lakheraj so far back as the year 1806, and that the plaintiff's claim was consequently inadmissible, dismissed the suit. On appeal to the High Court, the plaintiff contended that as his suit was not brought to resume or assess lakheraj or rent-free land, but to recover possession of certain lands which he had recently discovered were held by the defendant under no title whatever, and which were admittedly situated within his—the plaintiff's—estate, Clause 14,

Section 1, Act XIV of 1859, was not applicable to the case. The Court, however, held that whether the case be taken to fall under Clause 12, or under Clause 14 of the Section and Act referred to, the plaintiff's cause of action having arisen more than twelve years before the institution of his suit, his claim was barred by limitation. *Rajah Borodakanth Roy* v. *Sookmoy Mookerjee. W. R. I.* 29.

The Legislature in framing this Clause, has recognized two classes of suits for the assessment and resumption of rent-free tenures, namely, suits in respect of such tenures created subsequent to the date of the permanent settlement, and secondly suits in respect to such tenures created prior to that date.* The

* It may not be altogether out of place to notice here the much vexed question as to the jurisdiction of the Civil Courts in claims to assess or resume rent-free lands. In the case of *Moulvie Abdool Furar* v. *Sonatun Ghose, W. R. II.* 91, 205, the plaintiff seeking to resume certain lands, on the allegation that they were formerly part of his *mál* lands, and paid rent to him, but that they were then claimed by the defendant under a fraudulent lakheraj title, filed a suit for their recovery in the Collector's Court, under Section 30, Regulation II of 1819. The defendant pleaded a lakheraj title of a date prior to the year 1790. The case having been transferred from the Collector's Court to the Civil Court of the district, under Act VII of 1862, of the Bengal Council, was decided by the latter Court in favour of the plaintiff. The defendant having appealed to the High Court on the point of jurisdiction, the following issues were raised and discussed by a full bench of the Judges. *First*, whether a suit for the resumption of lands which have become lakheraj since 1790, is cognizable under Section 30, Regulation II of 1819, or not. *Second*, if not cognizable under Section 30, Regulation II of 1819, whether the jurisdiction of the Collector's Court, under Section 28, Act X of 1859, is an exclusive one in such suits, or is concurrent with the jurisdiction of the Civil Courts. In determining the first issue the Court were unanimously of opinion that previous to the passing of Regulation II of 1819, the Civil Courts had power in their ordinary jurisdiction to entertain regular suits by zemindars for the declaration of their right to assess or resume lands held under rent-free grants made subsequent to the 1st December 1790. A majority of the Court were further of opinion that the provisions of Regulation II of 1819, referred solely to suits in respect of lands which were claimed to be held exempt from payment of rent under grants made before the 1st December 1790, and in no way affected those suits in which exemption was claimed under grants of a later date. A minority of the Court were, however, of opinion that Section 30, Regulation II of 1819, was intended to apply and had, in fact, by the practice of the Court, been applied without distinction to suits arising in respect of either kind of tenure. With regard to the second issue, the majority of the Court decided that the jurisdiction of the Civil Courts to try claims for the assessment or resumption of lands said to be held rent-free, under grants of a date subsequent to the 1st December 1790, is not excluded by Section 28, Act X of 1859. It was also held by a majority of the Court that a mere statement in a plaint that the suit is brought by virtue of a particular enactment, does not affect the substantial character of the cause of action, and, consequently, that when a plaintiff in a suit, for the resumption of lands, which he alleges

alterations made in the old Law of Limitation by the provisions of this Clause may be considered in relation to each of these classes of suits respectively.

Under the old Law of Limitation it was held by the High Court, in the case of *Teeluck Singh Karpurdaz* v. *Ramprotab Tewaree, Hay's Rep. I.* 568, in accordance with a decision of the late Sudder Court, that the material question upon a plea of limitation in a suit to resume lakheraj is whether the tenure was in existence as lakheraj prior to the year 1790. The importance of this issue under the old Law, had reference to the provisions of Regulation XIX of 1793. Under Section 10 of that Regulation, a suit for the assessment or resumption of lands claimed by a plaintiff as part of his *mál* lands, was held to be exempted from limitation, if the alleged rent-free tenure was shewn to have been created later than the 1st December 1790. *Nawab Nazir Seedhie Nuzeer Ally Khan* v. *Nobocoomar Chowdhry. Hay's Rep. I.* 477. *Moulvie Abdool Furar* v. *Sonatun Ghose. W. R. II.* 91, 205. *Heera Monee Dabea* v. *Koonj Beharry Haldar. W. R. II.* 207.

It has however been decided by the recent ruling of the Privy Council in the case of *Chundrabullee Dabea* v. *Luckhee Dabea Chowdhrain, W. R. Privy Council Cases. V.* 1, that the provision of Section 10, Regulation XIX of 1793, which declares that "no length of possession shall hereafter be considered to give validity to any rent-free grant of a date subsequent to the 1st December 1790," must be taken to have been modified and controlled by the sixty years' rule of limitation enacted in Clause 3, Section 3, Regulation II of 1805. The particulars of this case were as follows. On the 15th April 1857, A instit-

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are held by the defendant under a rent-free tenure of a date subsequent to 1790, has erroneously stated in his plaint that his suit is brought under Section 30, Regulation II of 1819, it is nevertheless competent for the Court to consider and dispose of his claim. See to the same effect the cases of *Heera Monee Dabea* v. *Koonj Beharry Haldar. W. R. II.* 207. *Poorno Chunder Roy* v. *Khelal Chunder Ghose. W. R. II.* 258. *Bibee Oomutbutool* v. *Rajah Roy. W. R. Act X Cases. II.* 102. *Sookhoda Dabea* v. *Shaikh Azeemooddeen. W. R. II.* 302. *Moharanee' Odheeranee Koomaree* v. *Nobokull Khan. W.R. III.*5.

uted a suit against B for the recovery of arrears of rent of certain lands for six years and nine months preceding the institution of his suit. The lands in question lay within, and formed a parcel of a zemindary of which A was the proprietor in possession. B claimed to hold the said lands under a grant from the ancestor of A, bearing a date corresponding with the 10th February 1796, purporting to have been made for the setting up of an idol, and containing the following clause.—"Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grandsons. For this purpose I have given you this *bromuttur pottro*." The idol having remained, and its worship continued uninterruptedly from the date of this grant, B pleaded in answer to A's demand, that as she and those through whom she claimed had been in peaceable and undisturbed possession for more than sixty years, A's suit was barred by limitation. A's suit was, accordingly, dismissed by the Sudder Ameen, but was decreed on appeal by the Principal Sudder Ameen, whose decision was upheld by the late Sudder Court. The case having ultimately been brought before the Privy Council, their Lordships held that as B and those whom she represented had enjoyed peaceable possession for sixty years before A's suit was commenced, the suit was barred by limitation under Clause 3, Section 3, Regulation II of 1805, in which it is provided "that nothing in any part of the existing Regulations, shall be held, to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have arisen sixty years before the institution of such suit; nor shall any plea on the part of the plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient ground for taking judicial cognizance of any suit so preferred." This Clause, their Lordships observed, "embraces in its very comprehensive

language every then existing Regulation by which any Court in Bengal was authorized to take cognizance of any suit whatever; it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit; it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all inquiry into any original defect in the title under which the possession for the latter period commenced; it makes it, in effect, in cases to which the Clause applies, unavailing to show that the possession of the defendant commenced under a grant made null and void by Regulation XIX of 1793." In determining what the plaintiff's cause of action in this case should be held to be, and when it must be taken to have arisen, their Lordships remarked—"In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense the cause of action. In this view the suit might be likened to an action for the recovery of the later items only of a long account, which have become due within six years, although the Statute of Limitation has barred the demand for the earlier items. The distinction however between such an action and the plaintiff's suit is obvious; the items of an account are independent of each other; each represents a distinct contract or a distinct debt. But the right to recover rent for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character throughout the whole sixty years. It is the case of the plaintiff in the Court below that by reason of the character of the grant, and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. If, in spite of length of possession, an action for use and occupation could be maintained so long as a plaintiff could show a good title in himself and a bad one in the occupier, of what avail would any Statute of Limitation be? A man might be barred in an

action directly brought to recover the possession, such as ejectment, and yet not be barred when he sued from year to year, in use and occupation, for a compensation for the fruits of the land; because in this the occupation would be referable to the sufferance and permission of the real owner, and so be a good consideration for an implied promise to pay what it was worth. But this clearly could not be; and so here, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent which is the compensation for the occupation—that occupation having been always of one and the same character, in fact, rent-free." Their lordships, accordingly, dismissed the plaintiff's suit, as barred by the sixty years' possession of the defendant.

In the case of *Moulvie Abdool Furar* v. *Sonatun Ghose*, *W. R. II.* 205, it was held by a full bench of the Judges of the High Court that in suits brought under Section 10, Regulation XIX of 1793, to assess or resume rent-free lands, the *onus* rests with the plaintiff to prove that his claim is one falling within that Section, so as to show that it is excluded by the terms of that Section from the ordinary rule of limitation. The Court observed that if the plaintiff could prove, that the lands held by the defendant as lakheraj were a part of his—the plaintiff's—*mál* lands, and could show that they were assessed to the public revenue at the time of the permanent settlement, it might be presumed, until the contrary was established, that the right under which the defendant claimed to hold as lakherajdar commenced subsequently to the 1st December 1790. To the same effect, see the cases of *Sookhoda Dabea* v. *Shaikh Azeemooddeen*. *W. R. II.* 302. *Moharanee Odheeranee Narainee Koomaree* v. *Nobolall Khan* *W. R. III.* 5. *Tareenee Persaud Ghose* v. *Kalleechurn Ghose*. *Hay's Rep. II.* 90. *Maharajah Neelmonee Singh Deo Bahadoor* v. *Rajcoomaree Thakooranee* *W. R. II.* 171. *Saroda Soonderee Dabea* v. *Issurchunder Saha*, *W. R. Act X Cases. III.* 18.

By the latter part of Section 10, Regulation XIX of 1793,

the proprietors of permanently settled estates were authorized and required, without application to the Government, or to any Court of Judicature, to dispossess all persons holding lands belonging to such estates under rent-free grants of a date subsequent to the 1st December 1790. Where a plaintiff sued to recover possession of certain lands from which he had been ousted by the defendant zemindar under the provisions of the above Section, it was held by a full bench of the Judges of the High Court that the rule as to the onus of proof was not altered; that it was for the defendant zemindar to prove that the lakheraj was created subsequently to the 1st December 1790, and not for the plaintiff, who was in possession of the land as lakheraj land until ousted by the defendant, to prove that the lakheraj was created prior to that date. *Mon Mohinee Dossee* v. *Joykissen Mookerjee W. R. Sp. No. p.* 174. *Mohunt Prem Shewuck Doss* v. *Issuree Pershad. W. R. II.* 303. *Oottum Churn Dutt* v. *Ram Lal Dan. W. R. V.* 91. To the same effect see the case of *Denonath Paul* v. *Ramlochun Sircar, W. R. II.* 279, in which the plaintiff having been ousted from certain lands which he had held as rent-free, sued for a declaration of his right to hold these lands as lakherajdar. In support of his claim he filed a *sunnud*, of a date prior to the Company's accession, which was admitted by the defendant, and he was found to be in possession of the entire area of the lands for a declaration of title to which he sued. The defendant pleaded that the *sunnud*, which was indefinite as to area, was good for only a part of the lands, and that the rest belonged to his zemindary. The Court held that the *onus* was on the zemindar making this allegation to show that the excess lands had at one time formed a part of his *mál* lands.

But the rule would seem to be somewhat modified by the recent decision of the High Court in the case of *Nobokissen Mookerjee* v. *Promothonath Ghose, W. R. V.* 148. In this case the plaintiff as lakherajdar sued for possession of certain lands from which he had been dispossessed by the defendant the

putneedar. The defendant answered that the plaintiff was formerly putneedar of the estate in which the lands in dispute were situated, and was sold out for arrears of rent; that when the plaintiff was putneedar he fraudulently called the *mâl* land *lakheraj*, and remained in possession of the lands which he fraudulently termed *lakheraj* after his putnee was sold; and that he —the defendant,—having as putneedar all the rights of a zemindar had ousted the plaintiff under the power vested in him by Section 10, Regulation XIX of 1793. The lower court held that as the defendant admitted that he had dispossessed the plaintiff under the special powers vested in him by the above Section, it was for him to shew that the tenure was of the nature warranting the exercise of such special powers, and that on his failure to prove this, the plaintiff was entitled to recover the possession which had been illegally disturbed. On special appeal to the High Court it was observed that the general rule as to the *onus* of proof had been correctly laid down by the lower court, but that the special circumstances of the case took it out of the general rule. The Court held that as the plaintiff from having formerly been putneedar had special opportunity for knowing the exact position of the lands during his tenure, it was for him to show that the lands in dispute were lakheraj during the time he held the estate in putnee, before the defendant should be called upon to substantiate his plea as to the invalidity of the lakheraj holding.

Under the old Law of Limitation claims for the assessment or resumption of lakheraj land were barred by the twelve years rule of limitation, where it appeared that the lakheraj holding was of older date than the 1st December 1790. Thus, in the case of *Prankissen Roy Chowdhry* v. *Debnarain Bose. Hay's Rep. I.* 26, in which the plaintiff suid to resume certain lakheraj lands, it having been found that the defendant was in possession as lakherajdar from before 1790, under a title believed by him to be *bonâ fide*, the Court held that the defendant was at liberty

to plead limitation as against the plaintiff, who having been in possession of his zemindary for more than twelve years before suit was therefore out of time. In the case of *Heera Monee Dabea* v. *Lokenauth Mundul*, *W. R. II.* 135, it was held that where in a suit for resumption the defendant gives direct evidence of possession at a period only a few years short of 1790, it is competent for the Court to infer from collateral facts, and other circumstantial evidence, possession prior to that period, and that where the fact of the defendant's possession is so proved, the plaintiff's claim is barred by limitation where he is not an auction purchaser at a sale for arrears of Government Revenue within twelve years prior to the date on which his suit was instituted.

In the case of *Sreemutty Soobhogea Dabea* v. *Kallee Pershad Haldar*, *W. R. I.* 218, it was observed that before Act XIV of 1859, came into force, a purchaser of an estate at a sale for arrears of Government Revenue, might at any time within twelve years from the date of his purchase, sue for the resumption and assessment of lands belonging to the estate held under a rent-free tenure from a date prior to the year 1790.

In all lakheraj cases instituted subsequent to the 1st January 1862, from which date Act XIV of 1859 came into operation, the effect of the provisions of that Act upon the plaintiff's claim, must be taken into account. *Poornochunder Roy* v. *Khelalchunder Ghose W. R. II.* 258. *Dhunput Singh* v. *Boojah Sahoo*, *W. R. IV.* 53.

In the case of *Joykissen Mookerjee* v. *Kristomohun Doss Bukshee*, *W. R. III.* 33, the plaintiff, a putneedar, instituted a suit on the 23rd November 1863, for the resumption of certain lands as belonging to his putnee talook, but held by the defendant under an invalid lakheraj tenure from a date subsequent to the permanent settlement. The defendant pleaded limitation inasmuch as the suit was not brought within twelve years from the date on which the plaintiff's title accrued. The lower courts over-ruling this defence gave

a judgment for the plaintiff The defendant, on special appeal to the High Court, renewed his plea of limitation, contending that under the provisions of Clause 14, Section 1, Act XIV of 1859, which Law was in force at the time the suit was instituted, the plaintiff's claim was barred. In giving judgment in this case the Court observed that Section 18 of the Act referred to, provides that all suits instituted within two years from the date of the passing of the Act, shall be tried and determined as if the Act had not been passed: but that all suits to which the provisions of the Act are applicable which shall be instituted after the expiration of the said period, shall be governed by the said Act, and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding. The Act was passed on the 5th May 1859, and to avoid the effect of the limitation therein prescribed, it was necessary for the plaintiff to have filed his suit on or before the 5th May 1861. But by Section 1, Act XI of 1861, the operation of Act XIV of 1859, was postponed to the 1st January 1862, and it was declared that suits instituted before that date should be tried and determined as if Act XIV of 1859 had not been passed. The plaintiff's suit not having been instituted before the 1st January 1862, the Court was of opinion that he could derive no immunity from the operation of limitation, either under Section 18, Act XIV of 1859, or under Section 1, Act XI of 1861, and accordingly proceeded to determine whether his suit was barred under the provisions of Clause 14, Section 1, of the former Act. Upon this point, after considering the terms of the Clause referred to, the Court held that its provisions are applicable to all suits relative to rent-free tenures, whether created before or after the year 1790. It was remarked that "the object of the Legislature in not repealing Section 10, Regulation XIX of 1793, was to protect the interests of auction purchasers at sales of lands for arrears of Government Revenue, who are entitled to receive estates free of all incumbrances imposed by previous zemindars

subsequent to the date of the permanent settlement, and against whom no plea of long possession can hold good if their suit be brought within twelve years from the date of their purchase. In the same way a person receiving a grant of land from Government might also under this Clause sue within twelve years from the date of such grant to set aside a rent-free tenure under a title of later date than the permanent settlement. But the zemindars with whom the permanent settlement was made, and parties deriving their title from such zemindars, who under the provisions of Regulation XIX of 1793, and of Regulation II of 1819, had liberty to sue for the assessment of rent-free tenures, but have allowed time to run on without doing so, must be held to have lost their remedy; and against their suits limitation may now be pleaded since they have failed to bring their actions within twelve years from the date on which their title accrued." The Court further observed that where it appears that lands have been held rent-free from the date of the permanent settlement, even an auction purchaser, and *a fortiori* a zemindar with whom the permanent settlement was made and his representatives, are, under Clause 14, Section 1, Act XIV of 1859, precluded from suing to resume. Applying the views above indicated to the plaintiff's claim, the Court held that as the plaintiff as a putneedar deriving his title from the zemindar could be in no better position than the zemindar himself, and as the zemindar's right to resume, not having been exercised within the time allowed by law, had become extinct, that right could not be revived in the plaintiff as putneedar. The Court accordingly dismissed the plaintiff's suit.

Under the provisions of Clause 14, Section 1, Act XIV, of 1859, a party who can prove that he or those through whom he claims have held lands, whether established to be veritable lakheraj lands or not, from before the date of the permanent settlement, is absolutely protected from a zemindar seeking to

resume and even against an auction purchaser. *Bhugwan Chunder Bose* v. *Radhakisto Mytee. W. R. I.* 248.

In the case of *A. J. Forbes* v. *Sheikh Mean Jan, W. R. III.* 69, it was decided with reference to the provisions of the Clause under notice, that a plaintiff, who is an auction purchaser at a sale for arrears of Government Revenue, suing to resume or assess lands as wrongly held lakheraj from a date subsequent to 1790, and instituting his suit within twelve years from the date of his purchase, cannot be held to be barred by limitation unless it is shown that the land has been held lakheraj or rent-free from the time of the permanent settlement. The Court observed that in such a case the real question is, does the defendant prove a rent-free possession from the permanent settlement? And so far the *onus* is upon him. But that *onus* must not be imposed in such a harsh way, that after so long a lapse of time an honest holder cannot bear it, and *bonâ fide* holdings may be unjustly imperilled. It is not necessary that the defendant should give direct proof of holding to the exact date of the permanent settlement, but that he should give such evidence of long possession, of the character and repute of his holding, and otherwise, that the Court after weighing also any evidence on the other side, may be led to believe that the holding is really one of ancient date, as old as the permanent settlement, and not a modern appropriation. Compare the case of *Heera Monee Dabea* v. *Lokenauth Mundul ante*, p. 105.

In any suit to which any provision of Act XIV of 1859, is applicable, the *nullum tempus* Clause of Section 10, Regulation XIX of 1793, can have no operation. Accordingly, where a plaintiff instituted a suit on a date subsequent to the 1st January 1862, admittedly after the lapse of more than twelve years from the time when his cause of action accrued, the Court held that whether the suit was to be considered as a suit for the resumption or assessment of invalid lakheraj, or as a

suit for the recovery of an interest in immoveable property illegally alienated, in either case it was barred by limitation, in the former alternative under Clause 14, and in the latter, under Clause 12 of Section 1, Act XIV of 1859. *Dhunput Singh* v. *Boojah Sahoo. W. R. IV.* 53. *Rajah Borodakanth Roy*, v. *Sookmoye Mookerjee. W. R. I.* 29. In the case of *Dhunput Singh* the court observed that under Act XIV of 1859, the law of limitation in suits for the assessment or resumption of lakheraj lands when brought in the ordinary Civil Courts, is identical with that laid down in Section 28, Act X of 1859, for suits of the same nature when brought in Collector's Courts.

Since the jurisdiction of the Civil Courts and the Courts of Collectors in the trial of suits regarding lands held under invalid rent-free grants is concurrent, parties cannot be allowed after suing unsuccessfully in the latter Courts, to try the same question over again in the former. *Bibee Oomutbutool* v. *Rajah Roy. W. R. Act X Cases. II.* 102. A former suit for possession of certain lands, or for a declaration of a right therein, is no bar to a subsequent suit for the resumption of the same lands as invalid lakheraj. *Saroda Soonduree Dabea* v. *Issurchunder Saha. W. R. Act X Cases. III.* 18.

A sued B for the recovery of certain lands, alleging that these lands had been formerly held by him as lakheraj, and had been afterwards resumed by the Government and settled with him, but that B had dispossessed him. B on the other hand claimed to hold the lands under an independent title, to establish which he also had instituted a suit. The lower court considering only the question whether the lands in dispute were or were not included in the lakheraj estate settled with A, and finding that they were, gave judgment in favour of A. But it was held by the High Court on appeal, that if B's possession extended over a period of more than twelve years prior to suit, he was entitled, notwithstanding the decree of the resumption Court, to the benefit of the limitation prescribed by the Clause under notice. *Mussamut Bhoneshun* v. *Runglall Sahoo. W. R. I.* 109.

Certain lands formerly held as lakheraj were resumed and settled. A, one of the owners of the land before the settlement, sued B and C, with whom the settlement had been made, as his co-sharers for his share in the resumed and settled lands. The defendants pleaded that during a previous temporary settlement made with them, the plaintiff had been out of possession, and that as he had altogether been out of possession for more than twelve years, his claim was barred by limitation It appearing on the trial of the case that during a period prior to the final settlement, the lands had been held *khas* and let in farm to the defendants who had occupied them as farmers, and not as proprietors, in a way not adverse to the plaintiff, the Court held that although the plaintiff did not seem to have had possession of the lands in dispute within twelve years, still as the defendant could show no adverse proprietary holding for a period exceeding twelve years, the plaintiff's suit was not barred by limitation. *Gour Kissen Deb* v. *Ram Kanye Deb Roy. W. R. I.* 55. But the correctness of this decision may, perhaps, be doubted.

In a suit brought by the Government for possession of certain lands as appertaining to the Govenment *khas mehâl*, and for a declaration over-ruling the defendant's plea of rent-free tenure, a *primâ facie* case was made out that the lands in dispute belonged to the Government *khas mehâl*. The Court held that the *onus* of proof was thereby thrown upon the defendant who pleaded lakheraj, to show that his lakheraj tenure had existed on or before the 1st December 1790, and on his failure to do so, that the plaintiff's claim was not barred by limitation, the period of limitation as against the Government being sixty years, and the suit having been brought within that time. *The Government* v. *Gunga Gobind Mundul. Hay's Rep. II.* 33. This case was decided before the new law of limitation came into force, but the provisions of the new law would not, it is submitted, have affected the decision, since Section 17, Act XIV of 1859, provides that suits for the recovery of public claims shall be governed by the old rules of limitation.

SECTION 1, CLAUSE 15.

Limitation of 30 and 60 years.

Suits against depositaries, pawnees, or mortgagees.

To suits against a depositary, pawnee, or mortgagee of any property moveable or immoveable for the recovery of the same—a period of thirty years if the property be moveable and sixty years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing.

UNDER the provisions of Regulation II of 1805, no length of time operated as a bar to the institution of such suits as are provided for under this Clause.

This Clause applies in all cases in which there is a relation of trust, whether the property is given in mortgage, or pawn, or simply deposited for safe custody, and oral evidence of the deposit, if otherwise trustworthy, is sufficient. *Ruttun Monee Dabea* v. *Gunga Monee Dabea. W. R. III.* 94. But oral evidence cannot be admitted to show that a written deed, purporting to be a deed of absolute sale, was intended to operate only as a mortgage. *Kasheenath Chatterjee* v. *Chundy Churn Bannerjee. W. R. V.* 63. *Moolook Chand Surma* v. *Kooloo Chunder Surma. W. R. V.* 76.

In the case of *Roop Narain Singh* v. *The Government, W. R. II.* 163, it was held that where upon the resumption of certain lands, the Collector annually set aside ten *per cent* of the Revenue as *malikana* allowance, he might be considered

to be the depositary of such *malikana* allowance, and that the rightful owner might sue him in that capacity, and have, under this Clause, the privilege of a thirty years' limitation.

An acknowledgment by a mortgagee of the title of the mortgagor, or of his right of redemption, although made in a writing passing between the mortgagee and a third party and not to the mortgagor himself, or to those who represent him, is a sufficient acknowledgment within the meaning of this Clause to create a fresh period of limitation, there being nothing in the law which requires that such written acknowledgment should be made directly to the mortgagor. *Dur Gopal Singh* v. *Kasheeram Panday, W. R. III.* 3. But, compare the case of *Pershad Doss Dutt* v. *Deno Nath Dey, Hyde's Rep. II.* 14, where an admission of a debt to third party was held not to be an acknowledgment within the meaning of Section 4, Act XIV of 1859.

Where the mortgagee in possession purchases the mortgaged property at an auction sale for arrears of Revenue, it has been held that he acquires a new title, which if the mortgagor desire to dispute, he must institute his suit within twelve years from the sale. *Bykunt Dhur Singh* v. *Lallah Bhagobut Sahay. Hay's Rep. II.* 475. In this case the Court observed that fraud will not be presumed from the circumstance, that the estate fell into arrears while the mortgagee was in possession, but it will be held, unless the contrary be proved, that the purchase was a fair and legal transaction. This view which is supported by the decision of the late Sudder Court in the case of *Hurreebullub Santra* v. *Rutunmonee Dossee, S. D. D.* 1852, *p.* 392, is opposed to the ruling of the late Supreme Court in the case of *Raja Oojooderam Khan* v. *Aushootosh Dey,* (cited in *Macpherson on Mortgages, 3rd ed.* p 107,) in which such a purchase was held to be highly fraudulent, and the purchaser declared a trustee for the mortgagor.

A, the mortgagee of certain lands, obtained in 1835, a decree for foreclosure subject to the payment of two prior usufructuary

mortgages. In 1844, B and C purchased the rights of the mortgagor in the mortgaged lands, and in 1854, redeemed the two prior mortgages. A thereupon sued B and C for recovery of the possession of the said lands. The defendants contended that A's cause of action had accrued when he obtained the decree for foreclosure, since he had at that date an immediate right of possession upon discharging the usufructuary mortgages, and that as more than twelve years had elapsed since the date of that decree, the suit was barred. This view was adopted by the lower courts, and A's claim dismissed. But it was held by the High Court on appeal that by the decree of 1835, A was placed in the position of the original proprietor, and might re-enter on paying off the former encumbrances *whenever*—the suit was brought before Act XIV of 1859, came into operation—he chose; that B and C bought no right or title by the purchase of 1844, since the right and title of the mortgagor had already vested in A; and that subsequently in 1854, when the defendants discharged the prior mortgages they were still in the position of persons without adverse title, since they represented only the mortgagees whose interests had been assigned to them. The Court accordingly held that the law of limitation was inapplicable to the case. *Bhugwan Doss* v. *Behary Khan. Marshall's Rep. I.* 191; *Hay's Rep. I.* 437.

SECTION 1, CLAUSE 16.

To all suits for which no other limitation is hereby expressly provided—the period of six years from the time the cause of action arose.

Limitation of six years applicable to all suits not especially provided for.

IN the remarks upon the preceding Clauses of this Section, various cases have been noticed to which the general rule of limitation prescribed under this Clause has been held to be applicable. Reference may more particularly be made to the

case of *Saduk Mundul* v. *Watson & Co.*, and the other cases cited in the remarks on Clause 2, *supra*, p. 27, in which it was determined that in suits for damages for the wrongful removal and appropriation of personal property, the period of limitation is six and not three years; to the case of *Sonatun Goho* v. *Parbutty Churn Roy*, *supra*, pp. 57-58, in which the six years' rule of limitation was applied to a suit for the value of goods sold by wholesale; to the cases of *Sheikh Amjud Ali* v. *Syud Ali Buksh*, and *Radhanath Dutt* v. *Gobind Chunder Chatterjee*, *supra*, pp. 29, 58-60, in which it was held that actions for damages arising out of the tortious acts of servants or agents, are governed by the rule of limitation provided in this Clause; to the case of *Doorga Mohun Doss* v. *Doorga Monee Dossee*, *supra*, p. 60, in which it was decided that a suit for contribution or reimbursement by a party who has paid the entire amount due under a joint decree, may be brought at any time within six years from the time when the cause of action accrues; and to the case of *Chamur Ullah Sirdar* v. *Lokenath Holdar*, and the other cases cited *supra*, pp. 61-63, in which it was held that in actions arising upon registered contracts, or upon written contracts which could not by virtue of any Law or Regulation be registered, the period of limitation is that provided under this Clause.

Notwithstanding the uniform course of the decisions of the High Court, which declare the wrongful removal of personal property not to be an "injury to personal property" within the meaning of Clause 2, Section 1, Act XIV of 1859, it may still perhaps be doubted whether the view thus followed is not open to question. Blackstone, when treating in his Commentaries of the injuries to the right of property in things personal, observes:—"the rights of personal property in possession are liable to two species of injuries; the amotion or deprivation of that possession; and the abuse or damage of the chattels while the possession continues in the legal owner." *Stephen's Blackstone. 4th edition. Vol. III. p.* 510. Two classes

of injury to personal property are here recognized, and there does not seem to be any thing in the words of Clause 2, from which it can be gathered that it was the intention of the Legislature to deal with the former class of injuries alone, to the exclusion of the latter. Nor, looking at the reason of the thing, does there seem to be any good ground why the rule of limitation which the Clause referred to provides, should be applied to the one class of injuries, and not to the other. For example, A wrongfully enters B's granary, destroys one half of the grain which it contains, and carries off the other half. According to the course of the decisions of the High Court, B must bring his action in respect of the grain destroyed, within one year, but may sue for the value of the grain carried away, at any time within six years from the date of its removal. From what principle does this distinction—nowhere recognized in the Act itself—derive its sanction?

In connection with these remarks, and in addition to the cases noticed in the remarks upon Clause 2, the case of *Ramnath Roy Chowdhry* v. *Hurrochunder Roy Chowdhry*, *W. R. V.* 50, may be referred to. This was a suit to recover the value of certain *dhan* alleged to have been appropriated by the defendant. The plaintiff represented that on a partition of ancestral property taking place between him and the defendant, certain lands fell to the latter's share, on which lands plaintiff had stored a large quantity of *dhan* his own private property. The defendant denied having taken the *dhan*, and pleaded that as the suit was one for damages to personal property within the meaning of Clause 2, Section 1, Act XIV of 1859, the one year rule of limitation prescribed by that Clause was to be applied, and that the plaintiff's suit not having been brought within that time, was barred. The lower courts adopting this view dismissed the claim. But on appeal to the High Court it was held that the Clause referred to applied only to cases in which it was sought to recover damages for *injury* to personal property, but was not applicable to a case in which one person had appropriated personal

property belonging to another. In such cases the Court held that the rule of limitation provided under Clause 16, is to be applied.

In the case of *Raja Indoobhosun Deb Roy* v. *T. J. Kenney*, *Mofussil S. C. Ct. References. p.* 106, the rule of limitation provided under this Clause would seem to have been thought applicable to a suit by a lessor for the value of trees cut down by his lessee contrary to the provisions of the lease.

In the case of *Syud Munsoor Ally Khan* v. *Rajah Prossonno Narain Deb*, *Coryton's Rep. I.* 25, it was observed by the Court that the period of limitation in suits between principal and agent, except in cases of fraud, is six years.

A vakeel having received money for his clients, gave it to their agent for delivery to them. The agent having failed to deliver it, the vakeel was compelled by the Civil Court to pay it over again, and thereupon sued the agent to recover the money so paid:—it was held by the Madras High Court, *first*, that the case as being a suit for which no other period of limitation is expressly provided, fell to be disposed of under Clause 16, Section 1, Act XIV of 1859; *secondly*, that treating the case as one of implied contract, the plaintiff's cause of action arose when he was compelled to pay money which the defendant was legally bound to pay; and *thirdly*, that if the defendant was in truth the plaintiff's agent, but had induced the plaintiff to make him so by the fraudulent representation that he was the agent of the clients, the cause of action should be taken to have arisen on the discovery of the fraud. *Subharamareddi* v. *Bhimaraju Ramaya*. *Madras High Court Rep. II.* 21.

A and B being engaged in the manufacture of salt, received advances from the Government Salt Agent, for the repayment of which A was security. The Agent sued A for the recovery of the advances, and obtained a decree against him in March 1860. In execution of this decree A having had to pay the whole sum advanced, sued B, his partner, for contribution. On it appearing

that the partnership between the parties had terminated, and that an account had been struck in 1857, and that A's suit was not brought within three years from that date, the lower court held that the claim was barred under Section 8, Act XIV of 1859; but it was held by the High Court on appeal that it was erroneous to apply Section 8, to the case, since the suit was not in the words of that Section, a suit for balance of account between merchants or traders who have had mutual dealings; it was further held that A's cause of action accrued when in 1860, under compulsion of the decree obtained by the Salt Agent, he repaid the whole advance for which his partner was jointly liable, and that as A had instituted his suit in 1863, within six years from the time when his cause of action arose, and as no period of limitation is expressly provided for a suit of the kind, it must be taken to be governed by the Clause under notice, and so to have been brought within time. *Nobokristo Bhunj* v. *Rajbullubh Bhunj. W. R. III.* 134.

On the 5th July 1865, A, one of the proprietors of a joint estate, sued B his co-sharer to recover money due by the latter on account of his share of the revenue of the estate, to the payment of which the Collector had applied a deposit made by A under Section 15, Act XI of 1859. A's claim embraced the payments or deductions made by the Collector out of A's deposit, from January 1860, to September 1863. On behalf of B it was contended, *first*, that a deposit made by a sharer of an estate in order to protect his share from sale by reason of the default of his co-sharer, was "a payment under protest on account of arrears of revenue," within the meaning of Clause 4, Section 1, Act XIV of 1859, and that the limitation applicable to a claim for the recovery of money so paid was that of one year; *secondly*, if that were not so, that the claim fell to be disposed of under Clause 9 of the Section and Act referred to, and that consequently the plaintiff could not recover such instalments as had been paid by him more than three years before the institution of his suit. The lower court was of opinion

that neither Clause was applicable to the claim, but that it was governed by the rule of limitation prescribed by the Clause now under notice, and this view was confirmed by the High Court in the following judgment:—"There was clearly no payment under protest within the meaning of Clause 4, Section 1, Act XIV of 1859; nor is the suit, we think, brought 'to recover money lent, or interest, or for the breach of any contract,' within the meaning of Clause 9. The defendant's liability arises from the fact that the plaintiff's money, deposited by him in the Collectorate, has been duly applied by the Collector in payment of arrears of revenue due from the defendant in respect of his share of the estate. These arrears were a charge upon the entire estate—including the plaintiff's share therein—which would have been sold for the arrears, had not the plaintiff previously made the deposit and signed the agreement of pledge provided for by Section 15, Act XI of 1859. Notwithstanding that it was at the option of the plaintiff to make such deposit and pledge, we think, that when made, the application of the money of the plaintiff thereunder in discharge of the arrears due from the defendant, was a payment made on behalf of the latter, which he is bound by law to reimburse to the plaintiff. But this obligation arises not by virtue of any such contract as is contemplated by the 9th Clause of Section 1, Act XIV of 1859, but by the force of law. We therefore think that the 9th Clause does not govern this case; and, as no express limitation is provided elsewhere, that the suit must be governed by the 16th Clause. The suit was, in this view, instituted within due time, having been brought within six years from the earliest cause of action." *Boykant Nath Bhooya* v. *Ram Nath Bhooya W. R. S. C. Ct. Cases. IV.* 9.

A judgment-creditor having seized an estate in Chota Nagpore in execution of a decree, A appeared and claimed it, under Section 246, Act VIII of 1859, as his. He established his right, and the property was ordered to be released. As, however, it appeared that a smaller amount of revenue was being paid to

Government for the land in question than was legally payable, the Deputy Commissioner on the 20th September 1860, made an order that from the date of the attachment of the land, A should pay the Government Revenue at the full rate. A being dissatisfied with the above order appealed to the Commissioner, by whom, on the 25th of April 1861, the order was confirmed. From that time A paid the Government Revenue at the higher rate. But on the 5th July 1864, he instituted a suit to set aside the order of the Commissioner, and to recover the money paid by him in compliance therewith, in excess of the rate at which he had previously paid. The lower courts, considering the suit to be one for the recovery of money paid under protest in satisfaction of a claim made by the Revenue Authorities within the meaning of Clause 4, Section 1, Act XIV of 1859, held that the plaintiff's claim was barred as not having been brought within one year from the date of such payment. On appeal to the High Court SETON-KARR, J. was of opinion that although there was nothing to show that at the time of tendering the payment in each year a formal protest was made by the plaintiff, still the objection originally made to the Deputy Commissioner against payment, and the subsequent infructuous appeal to the Commissioner must be taken as equivalents to a protest. He observed that "an appeal to the higher authority set over the authority which disallows any request is a native's way of protesting. It is his mode of attempting to vindicate his rights, and what he does when the attempt has failed, may be said, looking to native modes of thought and action to be done under *protest*." Recognizing the plaintiff's payments to have been made under protest, the learned Judge was of opinion that the plaintiff could only recover the money so paid for one year previous to suit, but that he might sue to set aside the order of the Revenue Authorities of which he complained, and be allowed six years, under Clause 16, Section 1, Act XIV of 1869, for bringing his suit, no specific period of limitation having

been provided for a suit of that nature. MACPHERSON, J. concurred in the view that the plaintiff's suit to set aside the order complained of, might be brought at any time within six years from the date of the order; but was of opinion that no part of the claim for the recovery of the revenue paid in excess of the amount admitted to be due, could be maintained, on the general principle that a suit will not lie to recover money paid *to* a person who has committed no fraud or extortion, and *by* a person fully aware of all the facts and grounds on which the money was paid. He observed:—"although this money has been paid in satisfaction of a claim made by the Revenue Authorities on account of revenue, it has not, in my opinion, been paid under protest within the meaning of Clause 4, Section 1, Act XIV of 1859. The appeal to the Commissioner is the latest indication on the record of any protest, and I do not understand on what principle it can be held that money paid annually for three years after an order has been made by the Revenue Authorities, can be said to be money paid under protest, when there is no evidence of actual protest, and when the suit brought more than three years afterwards to set aside the order complained of, might have been instituted the day after that order was made." *Kebul Ram* v. *The Government W. R. V.* 47.

In a suit by an attorney instituted on the 15th June 1864, for the balance due upon a taxed bill of costs, it appeared that the defendant had signed a retainer in the plaintiff's favour in the year 1856, and that the services in respect of which the claim was brought, had been rendered to the defendant between the years 1856, and 1859, from which last date the relation of attorney and client ceased. The bill was not passed by the Taxing Officer until the 1st August 1861. The case was not defended, but the Court having intimated an opinion that the claim was barred by limitation, it was urged in behalf of the plaintiff that suits to recover remuneration for work and labour under a written engagement, stood in the same position

as suits for the price of goods sold and delivered under a written contract, and must be treated, where they cannot be registered, as falling within the provisions of this Clause. The Court, after hearing the argument, was of opinion that in cases in which there has been a written contract executed in Calcutta, whether to repay money lent, or for the price of goods sold wholesale, or for work and labour done, the period of limitation is six years under this Clause, since such contracts could not in the terms of Clause 10, have been registered by virtue of any Law or Regulation in force at the time and place of the execution thereof:* and, further, that inasmuch as an attorney is not entitled to maintain an action against his client during the pendency of legal proceedings for his costs in conducting such proceedings, unless the relation of attorney and client has been put an end to, the plaintiff's cause of action must be taken to have arisen at the time when the work contracted to be performed was completed. *Carruthers* v. *Menzies*, *Coryton's Rep. I.* 40.

In the case of *Dwarkanauth Moitro* v. *T. J. Kenny*, *W. R. S. C. Ct. Cases. V.* 1, the plaintiff, a vakeel, instituted on the 26th October 1865, a suit against the defendant for the amount of his fees for conducting a case which was decided on the 15th August 1862. The defendant pleaded that under Clause 9, Section 1, Act XIV of 1859, the plaintiff's right of action, which arose upon a verbal contract, was barred by limitation. For the plaintiff it was urged that as no specific provision for the limitation of such an action had been made in Act XIV of 1859, a period of six years should be allowed under Clause 16, Section 1

* This judgment was pronounced before Act XVI of 1864, which provides for the registration of such contracts as those referred to in the text, whether executed in Calcutta or elsewhere within the British territories in India, came into force. Act XX of 1866,—the Indian Registration Act—repeals Act XVI of 1864, but re-enacts its provisions in an amended form. Section 51, Act XX of 1866, provides a six years' period of limitation for suits to recover money lent, or interest, or for the breach of any contract in every case in which there is an engagement or contract in writing duly registered under the Act. Suits upon written contracts not duly registered continue to be governed by the provisions of Clause 10, Section 1, Act XIV of 1859. See *ante*, p. 63.

of that Act. The lower court expressed an opinion that the Clause relied on by the plaintiff was not applicable to the case which fell to be disposed of under the provisions of Clause 9, of the Section and Act referred to. The case having been submitted to the High Court for an opinion as to the period of limitation which should be applied in such suits, the Court held that where the contract between a pleader and his client is not in writing, the limitation to be applied to the pleader's claim for his fees, is that provided by Clause 9, Section 1, Act XIV of 1859, *i. e.*, three years from the time when the cause of action accrues; and that where there is no express stipulation as to the time at which the fees are to be paid, the cause of action in respect of conducting or defending a suit must be taken to accrue when the decision in the suit is given, the implied agreement in such cases being to pay one fee, and to pay it when the suit is decided.

The Limitation Act having made no express provision for the period of limitation for suits on foreign judgments, such suits may be maintained at any time within six years from the time when the cause of action arose, that is to say, within six years from the date of such judgments. *Boloram Gooy* v. *Kameenee Dassee. W. R. IV.* 108.

Some difference of opinion formerly prevailed as to the rule of limitation which ought to be applied to suits for the recovery of *wasilut* or mesne profits. The following cases will illustrate the views which have, from time to time, been entertained on this point. In the case of *Khettermonee Dossee* v. *Goopeemohun Roy, Hay's Rep. I.* 178,—instituted before Act XIV of 1859, came into operation,—the facts were as follows. On the 25th May 1832 the plaintiff's husband obtained a decree for the possession of an estate, and in 1837, upon his application, the Zillah Judge passed an order for the recovery of the mesne profits of the estate from 1817 to 1832. Under this order various sums were, from time to time, realized, partly through the intervention of the Court and partly by amicable arrangement out of

Court. No objection was made by the defendant, either to the legality of the Judge's order, or to the steps taken to enforce it, until August 1859, when it was discovered that as the decree for possession did not contain any order for the recovery of the wasilut, the Judge, who granted the order on the simple application of the plaintiff's husband, had exceeded his authority. No farther measures were consequently allowed to be taken, under the irregular order, for the recovery of any further wasilut. On the 14th February 1861, the plaintiff instituted a regular suit to recover the balance of wasilut from 1817 to 1832, still remaining due, with interest thereon. Under these circumstances it was held:—*first*, that where a party obtains a decree for possession, of an estate he may in accordance with the decisions of the late Sudder Court, sue for the wasilut of the estate decreed to him for a period of twelve years prior to the decree—in computing which period the time during which the suit for possession was pending is to be deducted,—and he may delay to sue for such wasilut until twelve years after the suit for possession was determined: *secondly*, that although the plaintiff's suit for wasilut, from 1817 to 1832, was not brought until 1861, and would therefore, under ordinary circumstances, be barred by the rule of limitation, still, the circumstance that the proceedings taken under the order of the Zillah Judge, although irregular in themselves, had been acquiesced in by the defendant, taken together with the acknowledgment by the defendant of the justice of the plaintiff's claim, by payments made on account of it, had served to keep the claim alive, and to exclude limitation.

Again, in the case of *Anundo Mohun Mitter* v. *John Grey*, 22nd February 1864, (reported in the *Englishman*,) it was held that under the provisions of Section 14, Regulation III of 1793, and in accordance with the decisions of the late Sudder Court, the right of action for mesne profits must be taken to commence from the date of the decree in a previous suit for possession of the lands in respect of which the claim for mesne profits is made It was observed that the same rule would

hold good under Act XIV of 1859, and that inasmuch as Clause 12, and not Clause 16, Section 1, of that Act, regulates the period of limitation in suits for the recovery of an interest in immoveable property, the period within which suits for mesne profits might formerly he brought is not altered.

In the case of *Ranee Surnomoyee* v. *Onnoda Gobind Chowdhry* *W. R. Sp. No.* p, 163, it was contended for the plaintiff, that in accordance with a series of decisions of the late Sudder Court, the effect of Section 14, Regulation III of 1793, was avoided when the suit for mesne profits was brought within twelve years from the time when the plaintiff, under a decree, obtained possession of the lands in respect of which the claim for mesne profits is made, inasmuch as the cause of action for mesne profits does not arise until all litigation for the possession of the lands has finally ceased. The case having been heard by a full Bench of the High Court, it was decided, in opposition to the view taken in the two cases above noted,* that a separate cause of action in respect of the wrongful receipt by a defendant of the rent or profits of land belonging to the plaintiff, accrues immediately upon the receipt by the defendant of each several sum; but that as, in general, suits for mesne profits cannot be conveniently or properly tried until after the question of title has been determined in a suit for possession, it seems not unreasonable,—looking at the language of Section 14, Regulation III of 1793, and the construction put upon it in a series of decisions by the Privy Council,—in reckoning the period of limitation in suits for mesne profits, to exclude the period of the pendency of a suit for possession, during which, whether the claim for mesne profits is being litigated in the same or another suit, the plaintiff's hands are stayed, and he is practically "precluded" from taking steps for obtaining the remedy he seeks in suing for mesne profits. The Court accord-

* In this case the decision in the case of *Khettermonee Dossee* v. *Gopee Mohun Roy*, was referred to as "an attempt to create a sort of double plea of limitation for which there is no warrant under the Regulation of Limitation, or otherwise".

ingly held that a plaintiff in a suit for mesne profits governed by Section 14, Regulation III of 1793, was entitled to recover mesne profits for twelve years before suit, excluding from such computation the period of the pendency of his suit for possession. From this decision, however, KEMP J. dissented on the ground that as claims for possession of lands and claims for mesne profits are separate and distinct causes of action, the pendency of a suit for possession, is no "good or sufficient cause," within the meaning of Section 14, Regulation III of 1793, to "preclude" a plaintiff from bringing a timely action for the recovery of mesne profits.

In this case it was observed that as Act XIV of 1859, Section 1. Clause 16, does not contain the exemptions found in Section 14, Regulation III of 1793, it would be prudent in plaintiffs, for the future, to include claims for mesne profits in their suits for possession.

In the case of *Lalla Gobind Suhaye v. Monohur Misser. W. R. I.* 65, it was held, in conformity with the view intimated by the Court in the case last cited, and in opposition to the opinion expressed by the Court in the case of *Anundo Mohun Mitter* v. *John Grey*, that the words "interest in immoveable property" in Clause 12, Section 1, Act XIV of 1859. do not to apply to claims for rents misappropriated by a wrong-doer in possession ; and that as there is no special law of limitation provided for suits for mesne profits, that the rule of limitation tc be applied is that provided under Clause 16, Section 1, Act XIV of 1859. To the same effect see also the case of *Gooroo Dyal Singh* v. *Ram Surun Singh, W. R. I.* 83, and of *Issureenund Dutt Jha* v. *Parbutty Churn Jha, W. R. III.* 13, in which last case it was decided that the privilege enjoyed by a plaintiff under the former law of limitation, in computing the period within which his suit for mesne profits must be brought, of deducting the time during which his claim for possession was pending in Court, no longer exists. Similarly, in the case of *Moharaj Koer Rumaput Singh* v. *J. Furlong, W. R. III.* 38, it was held that under Act XIV of 1859, mesne profits can be decreed only for six years before

institution of suit, and that the cause of action in suits for mesne profits arises from the date when they become annually due, and not from the date of the order of a Court for restoration of possession of the lands in respect of which they are claimed. See to the same effect, *Ranee Shama Soonduree* v. *Jardine, Skinner & Co.*, *W. R. III.* 144, and *Ekbal Ali Khan* v. *Kalee Pershad. W. R. III.* 68.

SECTION 2.

Suits against trustees and their representatives for breach of trust, &c.

No suit against a trustee in his lifetime and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding Section, to be computed from the decease of such trustee; provided that nothing herein contained shall prevent a co-trustee from enforcing, against the estate of a deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

Proviso.

WHERE a defendant holds certain lands as the deputy of the plaintiff, his holding cannot be regarded as adverse to the plaintiff. In such a case under the provisions of this Section a suit by a plaintiff for recovery of possession is not barred although the defendant be shewn to have held the land in question for more than twelve years. *Shaw Gholam Nujjuff* v. *Toossooduck Hossein. W. R. I.* 126.

Where no steps had been taken against the assets of a defaulting executor who died in 1836, the Court held that the claim of the representatives of the testator to a sum of money in the hands of the Administrator General, as representing the representatives of the defaulting executor, was barred by limitation. The Court, however, declined to express an opinion, whether in another form of suit, the claimant might not follow the assets under the provisions of this Section. *Re Palmer's Estate. Coryton's Rep. I.* 68.

Where it is shewn by the plaint that the relief sought by the plaintiff is based upon the ground of the defendant having been entrusted with the care and control of certain property for the benefit of the plaintiff's father, and of his having possessed himself of such property, and afterwards appropriated it to his own use, and it is proved that in respect of any property in the hands of the defendant he is liable as trustee to the plaintiff, limitation cannot, under this Section, be pleaded as a bar to the suit. *Rama Rau* v. *Raja Rau. Madras High Court Rep. II.* 114.

Ali Jan died leaving a will by which he set aside a portion of the income of his estate for religious purposes, and gave the remaining portion to his daughter Ahmudee and the children of his son Moostufa. Bundeh Ali, the husband of Ahmudee, was appointed executor, and the whole estate was made over to him in trust, with directions to account to Ahmudee. Ahmudee and the immediate heirs of Moostufa died, but before Ahmudee's death, Bundeh Ali granted certain mokururee pottahs of the property, and sold the reversion. Subsequently the heirs and representatives of Ahmudee, and of the children of Moostufa, sued to recover the property from the grantees of the pottahs and reversion respectively, on the ground that the alienations were in breach of the trust reposed in Bundeh Ali by Ali Jan's will. On this state of facts, among other issues the question arose whether the suit was barred as against all or any of the defendants by the law of limit-

ation. The lower court, on a finding that more than twelve years had elapsed from the execution of the deeds of alienation before the institution of the plaintiffs' suit, held that their claim was out of time. But it was ruled by the High Court, on appeal, that the finding of the lower court was not conclusive, since if the defendants, at the time of taking their respective interests, were cognizant of a subsisting trust affecting the property, or if reasonable enquiry would have made them so, they must be held to have taken the property subject to the trust,—notwithstanding that they may have paid full value for it,—and would in all respects stand in the shoes of the original trustee. In such a case, the Court observed, the defendants would not be *bonâ fide* purchasers from the trustee, entitled to the benefit of Section 5, Act XIV of 1859, but would be themselves trustees, within the scope of the Clauses of the Act which affect such persons. The case was accordingly remanded for trial on the merits. *Bego Jan* v. *Luteefun. W. R. V.* 120.

SECTION 3.

Shorter period of limitation, if prescribed by particular Acts, to prevail.

When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

A ZEMINDAR having estates in two districts, after paying the Income Tax assessment for all his estates to the Collector of one district, was compelled by the Collector of the other district to pay over again the tax leviable on the estates situated within that district. He thereupon sued both Collectors for a refund of the amount of the assessment which he had thus been compelled to pay twice over, but not having instituted his suit within three months from the date of the second payments,

he was met by a plea of limitation, under Section 245 of Act XXXII of 1860,—the Income Tax Act,—in which it is provided that "no suit, action, or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act.....after the expiration of three months from the accrual of the cause of action." It was urged on his behalf, that this special provision was applicable only where the conduct of the Income Tax Officer had been legal; that the act of the Collector who had enforced a second payment of the tax was an illegal act, done without colour of, and contrary to the law; and, consequently, that a suit arising out of such an act was not governed by the special rule of limitation laid down in the Section of Act XXXII above cited. But the Court held that as in levying the tax the Collectors were acting in their official capacity, whether they had acted legally or illegally they were protected by the Section referred to, and consequently that no suit would lie against them which was not instituted within three months from the accrual of the cause of action. *Gooroo Dass' Roy* v. *The Collector of Furreedpore. W. R. V.* 137.

In the case of *Judoonath Bhuttacharjee* v. *Nobokisto Mookerjee, W. R. S. C. Ct. Cases. III.* 2, the plaintiff sued to recover the consideration money paid by him to the defendant on account of a durputnee tenure, which tenure had become cancelled by the sale of the putnee, under the provisions of Regulation VIII of 1819, in consequence of the defendant's failure to pay rent to the zemindar. The durputnee pottah under which the plaintiff claimed, stipulated that in case the putnee should be sold through the defendant's default, he should make good the loss to the plaintiff. The defendant pleaded limitation under Clause 5, Section 17, Regulation VIII of 1819, which provides that actions for the recovery of claims like the above, must be brought within two months from the date of sale, whereas the plaintiff's suit had not been brought until upwards of ten months from that date. The Court

however, held that the Clause and Section of the Regulation referred to, related only to the disposal of the proceeds of a sale under the provisions of the Regulation, and could not be applied to a case in which it was not sought to recover compensation out of such proceeds. The plaintiff claimed under a written contract for the refund of a certain sum of money which he had paid to the defendant on the condition that it should be repaid by the defendant if the putnee should be sold. To such a suit the proper period of limitation to be applied is that provided under Clause 10, Section 1, Act XIV of 1859.

Section 4.

Revival of right to sue by admission in writing.

If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission; provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Proviso.

In the case of *Nobin Chunder Mozoomdar* v. *T. J. Kenny*, *W. R. S. C. Ct. Cases. V.* 3, the plaintiff, who had been employed by the defendant as a Factory Gomastah on monthly wages, left his service on the 27th October 1864, and subsequently, in the year 1865, sued for his wages from November 1863, up to the time of his quitting service. A portion of the plaintiff's claim was *primâ facie* barred under Clause 2, Section 1, Act XIV of 1859, as not having been brought within

one year from the time when the wages became due, but the plaintiff claimed exemption from limitation under that Clause, by reason that he had received from the defendant the following written and signed acknowledgment of the debt, dated the 27th October 1864. "Nobin Chunder Mozoomdar, you are requested to come and take the salary due to you." The plaintiff urged that by this writing a new contract was created to which either the three years' limitation provided in Clause 10, or the six years' limitation provided in Clause 16 of Section 1, should be applied On the other hand, the defendant contended that as the provisions of Section 4, applied only to cases of "legacy" and "debt," and not to claims for "wages," his letter could not have the effect of renewing the term of limitation applicable to the plaintiff's claim, and, at any rate, that as the letter in question did not specify any particular sum as due to the plaintiff, it could not be regarded as such an admission of the claim as would create a fresh cause of action. Upon both of these grounds the lower court held that the plaintiff's claim was barred, excepting that portion of it which was, according to the defendant's admission, within time. On a reference to the High Court it was decided that the case was governed by the rule of limitation laid down in Clause 2, Section 1, Act XIV of 1859. The Court observed:—"Servant's wages are a debt within the meaning of Section 4; and if the defendant had admitted a particular amount to be due to the plaintiff for wages, the period of limitation would have had to be computed from the date of the admission. The new period of limitation would, however, have been the same as that fixed by Clause 2, Section 1, since it is provided by Section 4, that the new period of limitation shall be computed according to the nature of the original liability. But in the writing on which the plaintiff relied, the defendant did not admit any particular amount to be due, nor did he admit wages to be due for any particular period. He merely admitted that something was due to the plaintiff for wages on the day when he left his

service. An admission of this indefinite character could not extend the time from which the period of limitation was to be computed."

A part-payment made on account of a debt does not keep alive the claim, so as to enable the creditor to bring an action after the period of limitation has expired, unless such payment has been accompained by an acknowledgment in writing signed by the debtor. *Ramnarain Chowdhry* v. *Bhugwan Jogey. Mofussil S. C. Ct, References.* p. 92.

A payment of interest due upon a bond, unaccompanied by any written acknowledgment of the subsistence of the debt, is not sufficient to take the debt out of the operation of the ordinary rule of limitation. *Chamar Ullah Sirdar* v. *Lokenath Holdar. Mofussil S. C. Ct. References.* p. 40.

In the case of *Persaud Doss Dutt* v. *Denonauth Dey, Hyde's Rep. II.* 14, the plaintiff as heir and legal representative of Sreemutty Ramdhun Dossee, some time in the year 1863, sued the defendant as one of the heirs and legal representatives of Muddoosoodun Dey, to recover money lent in the year 1846, by Sreemutty to Muddoosoodun, with interest up to the date of suit. There being no written contract, the claim would under Clause 9, Section 1, Act XIV of 1859, have been barred by limitation; but the plaintiff claimed exemption from limitation under that Clause, by reason of the defendant having admitted that the debt and interest thereon were due in the following written acknowledgment signed by him, and dated the 27th October 1862. "Muddoosoodun Dey, in his life-time, borrowed Rs. 350, upon deposit of the title deeds of a house situate in Burra Bazar in Calcutta, which have not been redeemed. The principal sum of Rs. 350, with a large amount of interest, is still due to Persaud Doss Dutt." This acknowledgment was contained in a paragraph of an answer of the defendant to a bill in equity filed against him and others by his brother, and was not made directly to the plaintiff. The question which the Court had to decide was whether

such an admission was sufficient to take the case out of the operation of the Act. It was held that a mere admission in writing to a third party, or stranger, that a debt is due and still unpaid, does not amount to an "acknowledgment" within the meaning of this Section, in which the word must be taken to imply a liability or obligation,—an acknowledgment that the party to whom the debt is due, has still a right to recover. The Court observed that there had been conflicting decisions in the English Courts as to the meaning of the word "acknowledgment" in the first Section of Lord Tenterden's Act, 9 Geo. IV. c. 14, but that the more recent decisions were opposed to the view that an admission to a stranger or third party that a debt is due, is sufficient to exclude limitation.

It may, however, be argued that as the written acknowledgment required by this Section, is only necessary to evidence the existence of a renewed contract, and not to constitute such contract, there is really no reason why the acknowledgment should not be contained in a letter to a third party. And this view would seem to have been followed by the Court in the case of *Hurro Chunder Roy*, v. *Monee Mohinee Dossee*, *W. R. S. C. Ct. Cases. III.* 6, in which the facts were as follows. The plaintiff lent the husband of the defendant a certain sum of money, without taking any written acknowledgment of receipt, or engagement for re-payment. The loan was not repaid by the defendant's husband during his life-time. On his death, the plaintiff demanded payment from the defendant, who gave a *burât* upon her manager for a portion of the loan, in which *burât* the entire debt was admitted. Subsequently, the plaintiff having sued the defendant for the balance of the sum lent with interest, was met with a plea of limitation. On behalf of the plaintiff it was contended, that the admission of the debt by the defendant in the *burât* upon her agent, gave rise to a fresh period of limitation under Section 4, Act XIV of 1859, and that the suit having been brought before the expiry of the

fresh period of limitation, was not barred. For the defendant it was urged that to create a new period of limitation an express engagement in writing to repay the alleged debt, as provided in Clause 9, Section 1, Act XIV of 1859, was necessary. The Court was, however, of opinion that the provisions of Clause 9 of Section 1, and those of Section 4, were altogether distinct; that the latter alone referred to cases in which claims barred by limitation are capable of being revived, and contained nothing to show that the meaning of the word "acknowledgment" should be restricted to a written admission or engagement to repay addressed to the creditor; and, consequently, that any acknowledgment in writing of the debt, signed by the debtor, although addressed to a third party, would be sufficient to satisfy the requirements of the Section. This view, it may be remarked, is supported by the decision of the Court, in the case of *Dur Gopaul Singh* v. *Kasheeram Panday*, cited *ante*, p. 112, in which it was held that an acknowledgment by a mortgagee of the title of his mortgagor, although made in a writing passing between the mortgagee and a third party, and not made directly to the mortgagor himself, is a sufficient acknowledgment within the meaning of Clause 15, Section 1, Act XIV of 1859, to create a fresh period of limitation.

The following important decisions pronounced by the Madras High Court in reference to the meaning of the word "acknowledgment" as used in this Section, deserve careful attention.

In the case of *Khwaja Muhammad Janula* v. *Venkatarayar*, *Madras High Court Rep. II.* 79, the plaintiff, in February 1864, sued to recover the balance of principal and interest due on a bond executed by the defendant on the 20th January 1858, in which he engaged to repay the debt in three instalments, within the 12th March 1859. The plaintiff stated in his plaint, that as the defendant had made a payment on the bond on the 19th March 1862, of which payment the defendant had himself made a written but unsigned memorandum on the back of the bond,

the suit was not barred by limitation. The case having been referred to the High Court for an opinion as to whether a part-payment of a debt by a debtor, evidenced by his written but unsigned memorandum of such payment, was a sufficient acknowledgment to entitle a creditor to a fresh period of limitation, it was held that part payment is not in itself, though evidenced by writing, an admission of a debt within the meaning of Section 4, Act XIV of 1859. SCOTLAND, C. J., in delivering the judgment of the Court, said:—"Looking to the preamble of the Act, and to its whole frame and scope, it was evidently intended to enact fully the law relating to the limitation of suits; and its express enactments, we think, exclude the effect of part-payment as an acknowledgment. Before the Act passed, part-payment operated, at all events within the Presidency towns, as an acknowledgment of a debt so as to defeat the law of limitation, upon the same principle as that applicable to other acknowledgments since the leading English authority of *Tanner* v. *Smart*, namely, that it was evidence of a new promise from which a fresh cause of action arose. Now the 4th Section of the Act provides expressly for the acknowledgment of debts which would otherwise be barred, and it gives to a written acknowledgment all the effect of a new promise giving rise to a fresh cause of suit. The reasonable construction of this Section, we think, is that a written acknowledgment alone was intended to have that effect, and that impliedly a new period of limitation is excluded in any other case. The Legislature must be taken to have had before them the Statute 9 Geo. IV. c. 14,—extended to India by Act XIV of 1840,—and the other Limitation Statutes. This construction is, we think, further strengthened by the enactments in Clause 13, Section 1, and in Sections 6 and 19 of the Indian Limitation Act, by which part-payment is expressly made to regulate the period of limitation. To enable a plaintiff, then, to have the benefit of a new period of limitation under Section 4, he must prove that the party sued has in a writing authenticated by his signature, either

in express terms or by reasonable construction acknowledged or admitted that the debt, or a part thereof, is due from him. It is not, however, we think, necessary that the signature of the party should be formally subjoined or added to an acknowledgment written by himself, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature, in either of which cases the additional authentication by the party's signature would be necessary. Our opinion therefore is, that evidence of part-payment without an acknowledgment in writing containing an admission of the debt, will not suffice to give rise to a new period of limitation: but that there may be a sufficient acknowledgment in writing, though the signature of the party is not subjoined or added to the writing."

In the case of *Rajah Icvara Das* v. *Richardson and others*, *Madras High Court Rep. II.* 84, the plaintiff, in 1863, sued three executors for the balance due in respect of cash advanced to their testator in 1844, and of a promissory note at six months dated 4th August 1850. A part payment was admitted to have been made by the defendants in 1860. Two of the defendants had also—during the life time of their testator—given a personal undertaking in writing, dated 4th January 1860, to pay the debt out of a fund coming into their hands. The defendants had also, as executors, signed and sent a letter to the plaintiff informing him that they had registered his claim against the testator's estate, and that notice would be given to him when the assets, if any, were to be distributed. Three questions accordingly arose, *first*, whether the part-payment in 1860, took the case out of the provisions of Clauses 9 and 10, Section 1, Act XIV of 1859; *second*, whether the personal undertaking by the defendants had that effect; and *third*, whether the executors' letter to the plaintiff had that effect. BITTLESTON J., after consultation with the Judges by whom the case last cited had been decided,

delivered the following judgment:—" The conclusion at which we have arrived is, that part-payment of a debt has no effect in preventing the operation of Act XIV of 1859, as to the residue. The prescribed period of limitation begins to run as soon as the debt is payable; and, obviously, the payment of a part of the debt does not, in any degree, lessen the period during which the balance has been payable. But according to the decisions of the English Courts since the Statute of James, a part-payment has been treated as an acknowledgment of the debt, amounting to, or affording evidence of a new promise to pay the balance. It is upon this ground only that part-payment has, according to English law, the effect of giving a new period of limitation from the date of the part-payment. But Section 4, of the Indian Act expressly gives a new period of limitation in the case of a *written* acknowledgment of a debt, while it is wholly silent as to any such effect arising from part-payment; though in the Act there are two instances, Clause 13, of Section 1, and Section 6, in which the original period of limitation is made to run from the last payment on account. A reference to the English legislation on the same subject strongly supports the view, that the Indian Legislature did not intend that payment of part of a debt should give to the creditor a new period of limitation from that time. Before the Statute 9 Geo. IV. the decisions had established three modes whereby a case might be taken out of the operation of the Statute of Limitations. These were, *first*, acknowledgment by words, *secondly*, a promise by words, and *thirdly* part-payment; and that Statute since it provided that no acknowledgment or promise by words only should be sufficient for that purpose, and that nothing therein contained should take away the effect of any payment, clearly applied to the first and second methods only, and not to the third; so that when the English Legislature took away from parole acknowledgments, the effect which had been given to them by the decisions, they expressly reserved the effect of

part-payment. Again, 3 and 4 Wm. IV. Cap. 42, Sec. 5, uses language very similar to that of the 4th Section of the Indian Act; but it expressly puts acknowledgment by writing and acknowledgment by part-payment on the same footing, and gives a new period of limitation from the one as well as from the other. The Statute 9 Geo. IV. was expressly extended to India by Act XIV of 1840, and the Indian Legislature must be taken to have had before them not only that Act, but also the other Acts of the English Legislature upon the same subject when they were framing the Act XIV of 1859. With these Acts then before them, they have expressly provided for the single case of an acknowledgment in writing, giving to that the same effect which it has by the English law, and so doing, have impliedly excluded every other acknowledgment—an acknowledgment by part-payment just as much as an acknowledgment by words only. The next question in this case is, whether there has been any such acknowledgment in writing as to bring the case within Section 4. Two documents are relied upon for this purpose. The first a personal undertaking by two of the defendants to pay the debt out of money coming to their hands from a certain estate; but this was given by them in the life-time of the testator, and was certainly no acknowledgment by them as his executors, in which character they are now sued jointly with their co-executor. Nor assuming this document to have been given by them at the request of their testator, is it an acknowledgment signed by him within the meaning of Section 4. It is not signed by him, and even if the defendants could for this purpose be treated as having signed as his agents, signature by an agent was held insufficient under Statute 9 Geo. IV., and must be held equally insufficient under the Indian Act. The Indian Legislature has declined in this respect also to follow the course of recent English legislation (19 and 20 Vict. Cap. 97. Sec. 13), whereby the signature of an agent is expressly made sufficient. The other document raises more doubt. It is signed by the

three defendants as executors of the testator, and, in reply to a letter forwarding to them the plaintiff's account and requesting that they will register the same for payment, it acknowledges the receipt of that letter, and informs the plaintiff that they have registered his claim, and will give him notice of the distribution of assets if there should be any. Now, if the English cases, after as well as before Statute 9, Geo. IV., are to govern the construction of Section 4 of the Indian Act, the acknowledgment must be such as to import a new promise to pay which will sustain the suit. *Cockrill* v. *Sparke*, 32 L. J. Exch. 118, decided upon Statute 3 and 4 Wm. IV. Cap. 42, Sec. 5, is one of the latest cases; and there, though the defendant's letter contained a distinct admission of the debt, it was held insufficient because it was written only to keep alive his liability as a surety in case the plaintiff should receive a dividend out of the estate of the principal debtor, and shewed no new contract of fresh liability. But I do not think it necessary in the present case to say, and I decline saying, how far the English cases on this point are to be considered applicable to Section 4 of the Indian Act; for in this case, it seems to me that the letter relied upon does not contain any admission of the existence of the debt sufficiently distinct to bring the case within the Section. The language is satisfied by interpreting it thus:—We have received your claim against the estate of our testator and registered it as a claim; if there should at any time be assets to distribute, you shall have notice and then you can substantiate your claim;—and giving it that meaning it is evidently not an acknowledgment within the provisions of Section 4."

In the case of *Kristna Rau* v. *Hachapa Sugapa*, *Madras High Court Rep. II.* 307, the plaintiff sued the defendant for the balance due upon a registered bond, instituting his suit more than six years after the sum secured by the bond became payable. The defendant pleaded limitation, but the plaintiff contended that a memorandum of part-payment endorsed upon

the bond by the defendant, had the effect of extending the period of limitation. The memorandum which was signed by the defendant, was to the following effect:—"Payment on account of this up to the 21st November 1858; the interest was paid in full and Rupees 107, on account of principal." In deciding this issue, the Court, after referring to the last two cases above cited as determining that part-payment on account of a debt is not of itself sufficient to give a new period of limitation without a written acknowledgment of the debt within Section 4, Act XIV of 1859, went on to observe that that Section does not require that the writing should express in terms a direct admission that the debt or part thereof is due, but that it is left for the Court to decide in each case whether the writing, reasonably construed, contains a sufficient recognition of the debt or any part of it. With reference to the memorandum on which the plaintiff relied, the Court was of opinion that, "giving to the expressions therein used their ordinary meaning they clearly implied an admission that the debt due upon the bond at the time the defendant signed the memorandum, was the amount of the principal less the sum of Rupees 107, the sum stated to have been paid. There is therefore, a written acknowledgment by which the defendant has admitted a debt to be due on the bond, and it contains no qualifying expressions as to payment. This is sufficient to satisfy the 4th Section of the Act, and to continue the liability of the defendant as a simple bond debtor. This decision is consistent with the principle acted upon in the English decisions as to written acknowledgments since the leading case of *Tanner* v. *Smart*; but in saying this it is not to be understood that we consider that any acknowledgment which did not come within the rule laid down in those decisions, would be insufficient to satisfy the 4th Section of the Act. The present decision proceeds upon the ground that the writing contains an unqualified admission of the debt, but we do not mean in any way to say that a distinct admission

by an acknowledgment in writing of a debt due and owing, would not satisfy the Section, if it were accompanied with any expressions which did not warrant the inference of a promise to pay. At present we incline to think that such an admission would suffice, even although from the expressions used as to payment, a promise to pay on request would not, according to the English cases, be implied."

The decision of the High Court, in the case of *Hollodhur Bangal* v. *C. S. Hogg*, *W. R. I.* 109, may perhaps be thought open to question. The plaintiff sued on an instalment bond executed by the defendant in the year 1855, wherein the defendant engaged to pay a certain sum in ten yearly instalments, the first instalment being payable in 1856, and the last in 1866. It was stipulated in the bond that on the non-payment of any one instalment, the whole sum secured should immediately become payable. The defendant made a part-payment only on account of the first instalment in the year 1856, but subsequently, from time to time, made several other payments. The plaintiff's suit for the balance of the principal sum with interest, instituted in 1863, was dismissed by the Court of first instance, as barred by limitation under Clause 10, Section 1, Act XIV of 1859, inasmuch as it had not been brought within three years from the time when the cause of action accrued in the year 1856, upon the defendant's failure to pay the instalment due for that year. The Court of first instance treated the payments subsequently made as ineffectual to prevent the operation of limitation, inasmuch as it is provided by Section 4 of the Limitation Act, that a written acknowledgment of the debt is necessary for this purpose; and cited the decision in the case of *Chamar Ullah Sirdar*, see *ante*, p. 132, as showing that payment of interest, without a written acknowledgment of the debt, is of no avail to avoid the bar of limitation. This decision was reversed by the lower appellate Court, by whom it was held that although the plaintiff might have sued for the whole sum secured by the bond upon the non-payment of the

first instalment in, 1856 yet he was not bound to bring his suit at that time; but that a suit might be maintained for the whole amount secured by the bond at any time within three years from the end of the year in which the last instalment became payable: and, further, that even if the law of limitation could be applied to the case, still the payments made by the defendant subsequent to the year 1856,—which must be treated as payments of, or on account of instalments, and not merely as payments of interest or as part-payments of the principal sum,—showed a waiver of the right to treat the whole sum as due and recoverable upon the default in the payment of the first instalment. Lastly, the lower appellate Court was of opinion that at any rate the plaintiff's claim was not barred in respect of any instalment falling due within the three years immediately preceding the institution of the suit. The case having come before the High Court on special appeal, the following judgment was delivered by MORGAN and SHUMBOONATH PUNDIT J. J.—"We cannot entirely adopt the reasoning or the decision of either Court. If we put aside for a moment the effect of the subsequent payments and regard the case simply as one in which the point to be decided is, what length of time bars a suit on an instalment bond like that now sued on, the case is not free from difficulty. We find that the Court of first instance is supported by high authority in the view that a stipulation making the whole sum due on default in payment of one instalment, creates a cause of action for the whole on the happening of any default, which cause of action must be sued on within the appointed period; and that no further right of suit arises in respect of any non-payment of subsequent instalments. The Court of Queen's Bench held in a like case, * that the cause of action accrued upon the first default for all that then remained owing of the whole debt: and that no suit could be maintained except within the appointed time from the accrual of that cause of action. The ground of that decision is thus stated in the judg-

* Hemp v. Garland, 4 Queen's Bench Reports. 524.

ment:—"If the plaintiff chose to wait, till all the instalments " became due, no doubt he might do so; but that which was " optional on the part of the plaintiff would not affect the right ' of the defendant, who might well consider the action as accru- " ing from the time that the plaintiff had a right to maintain it. " The Statute of Limitations runs from the time the plaintiff " might have brought his action, unless he was subject to " any of the disabilities specified in the Statute; and as the " plaintiff might have brought his action on the first default, " we think that the defendant is entitled to the verdict upon " the plea of the Statute of Limitation." On the other hand, it has been held by the Agra Sudder Court,* that although the plaintiff refrain from suing on the occasion of the breach of the stipulation by a non-payment of any one instalment, this does not impair his right to recover instalments which became due within the appointed period of limitation before suit. Whichever of these two judgments be adopted—and we are not called upon for a decision upon this point,—they are both opposed to that portion of the judgment of the lower appellate Court which holds that the law of limitation does not begin to operate until after the whole of the instalments have accrued due. This last view appears to us untenable, and it is not consistent with the admitted right of the plaintiff to bring a suit, for each instalment as it falls due. The payments made by the defendant have a very important bearing on the decision of this case which relieves us from the necessity of expressing any opinion on the question above stated. Admitting the Court of first instance to be correct in the opinion that the cause of action accrued upon the first default, it seems to us that it was competent to both parties after such default to show by their conduct that they treated the debt as one still payable by instalments. If the defendant has, from time to time, paid, and the plaintiff received sums of money on account of unpaid instalments of former years, the effect of such payment and acceptance is, as the lower

* Agra S. D. D. 1851 p. 401.

appellate Court has determined, to waive any existing right to take advantage of a previous default, and to restore the provision for payment by instalments. The circumstances under which those several payments were made and accepted are not before us in evidence. If they were made on account of interest, or in part-payment of the principal sum secured by the bond—treating that sum as then due,—they would have no effect in preventing the operation of the law of limitation. If, on the other hand, they were taken, as appears to be the fact, on account of instalments then over-due, they go to show a waiver or agreement to restore the original provision for payment by instalments. The Act requires that the suit shall be brought within three years from the time when the debt became due, or when the breach of contract took place. These words clearly bar all suits for unpaid instalments of older date than three years before the suit, and all suits in respect of the consequences of the non-payment of such instalments. Instalments due at the time of suit, which had accrued due within the three previous years, are recoverable. We therefore remand the case to the Court of first instance for a new trial. If the Court finds that the payments were on account of instalments, it should appropriate such payments in discharge of the instalments as they severally became due, unless the Court is satisfied that the payments, or any of them, were specially appropriated to any particular instalment, in which case such payments should remain so appropriated. Instalments which accrued due within three years immediately before suit should be decreed."

In reference to the above decision, it is necessary to consider whether the view that the law of limitation may be avoided by waiver can be recognized as correct The Court in its judgment accepts the view that the plaintiff's cause of action accrued on the defendant's failure to pay the first instalment of his bond, but holds the subsequent conduct of the parties to indicate that they had waived that condition of the bond which made default in payment of any one instalment to give rise to a

cause of action for the whole sum secured. But if the cause of action had actually accrued, the question arises whether it was competent for the parties by any conduct of theirs, otherwise than as provided by the Section under notice, to alter the consequences which legally resulted from that fact. When the cause of action for the whole sum secured arose, limitation began to run, and mere payment of subsequent instalments could no more exempt the case from the operation of limitation than part-payments on account of the principal or interest then due, could have that effect. There does not seem to be any real distinction in principle between the case of a contract to pay by instalments with a condition that on default of one instalment the entire sum shall be payable, and of a contract to pay at a future date by a single payment. Where A binds himself to pay B a certain sum at a future date, and fails to do so, B's cause of action arises from the time when A should have paid, and limitation will run against him from that time. If during the currency of the period of limitation, or after its expiry, A should make, and B accept a part-payment of the debt, such payment and acceptance could not be construed as a waiver of the original condition as to the time when the debt was to be paid, and could in no way affect the operation of limitation. In the case of *Hollodhur Bangal*, the only ground on which it seems possible to hold that the plaintiff's claim was not barred by limitation is, that the conduct of the parties in making and receiving payments after the cause of action on the original contract had accrued by the breach thereof, may be taken to afford evidence of a new and distinct contract having been entered into by the parties, for which the balance then due to the plaintiff may be regarded as the consideration. This new contract, it might be argued, gave rise to an entirely new cause of action, with a new period of limitation to be reckoned without reference to the accrual of the cause of action upon the original debt. The only reported case which seems distinctly to support the view here set forth, is that of *Doyle* v.

Allum Biswas, cited *ante*, p. 53, in which it was held that the creation of a new contract of the character above indicated may be established by oral evidence But that case was decided by the same Judges as the present case, and seems open to the same objection, namely, that under the provisions of Section 4 of the Limitation Act, an existing debt cannot be so modified or renewed as to give rise to a new period of limitation, unless the new contract be evidenced by a written and signed acknowledgment. See the case of *Ram Narain Chowdhry*, cited *ante*, p. 54. But even if this view should be deemed erroneous, it may still be remarked that the fact of the plaintiff continuing to receive instalments after his cause of action had arisen, if it proves anything, proves nothing more than that he slept over his rights, or did not understand them, but is no evidence of any new contract.

Before leaving the case of *Hollodhur Bangal*, it seems necessary to notice the question which in deciding that case the Court declined to determine, namely, whether under the peculiar terms of the bond, and apart from the effect to be given to subsequent part-payments, limitation should be taken to have run against the whole claim from the defendant's first default. On this point, if the terms of the bond itself should be thought to leave room for doubt, the ruling of the Court of Queen's Bench in the case of *Hemp* v. *Garland*, seems conclusive. That ruling has been followed by the Madras High Court in the case of *Karuppanna Nayak*, cited *ante*, p. 17, in which that Court having to deal with facts precisely parallel with those arising in the case already referred to—*ante*, p. 143—as having been decided by the Agra Sudder Court, came to a directly contrary conclusion.

In the case of *Baroda Soonduree Dabea* v. *Shumboochunder Shaha*, *W. R. V.* 45, in which the facts resembled those in the case of *Hollodhur Bangal*, the view as to waiver laid down in that case, appears to have been carried to a still greater length, inasmuch as the waiver would seem to have been inferred

from the fact of a single payment having been made and accepted after the first default; but the decision, as reported, is too obscure to allow of its being safely accepted as a precedent.*

In the case of *Breen* v. *Balfour*, *Bourke's Rep. I.* 120, the facts were somewhat analogous to those in the case of *Hollodhur Bangal.* The plaintiff sued the defendant Balfour for the balance due upon a promissory note, of which he with two others were joint and several makers. The note which bore date the 20th August 1857, was made payable by thirty-five equal instalments, the first of which was to fall due on the 10th September 1857, and the rest were to be paid regularly every succeeding month. The note contained a stipulation that in case of default in payment of any instalment, or of any part of any instalment, on the day appointed for such payment, and notwithstanding that the same might afterwards be paid, the whole sum secured by the bond, or such part as might then remain unpaid, should immediately become due and recoverable. The 4th instalment, which, by the terms of the note, should have been paid upon the 10th December 1857, was not paid until the 5th January following, and, similarly, other subsequent instalments were not punctually paid. The last payment made, was made on the 14th January 1860, on account of the instalment due on the 10th

* In their judgment in this case, the Judges cited a passage from Mr. Angell's work on Limitations, to the effect that "an acknowledgment or new promise may be inferred from the fact of a part-payment of a contract, or from the payment of a smaller on account of a greater sum of money due from the party making the payment to the party to whom it is made." Mr. Angell's observation, although perfectly correct with respect to the English Statutes to which it refers, has no application whatever to Section 4 of the Indian Act. That Section, indeed, as it originally stood in the Draft Act submitted to the Legislative Council on the 12th February 1859, did contain a provision by which "a part-payment on account of principal or interest" was allowed to give rise to a new period of limitation, but that provision was, on the motion of Mr. Peacock, omitted. Mr. Peacock said:—"This part of the Section is in accordance with the English Law. But I object to the rule laid down by the English Law respecting the effect of a part-payment. That rule proceeded on the principle that a part-payment operates as an acknowledgment from which a new promise to pay may be implied. I am of opinion that in this country proof of part-payment should not have this effect." See Proceedings of the Legislative Council of India for the year 1859 p. 58; see, also, the opinions of the Judges of the Madras High Court, cited *ante*, pp. 135-140.

August of the previous year. The plaintiff having instituted her suit on the 6th January 1865, the defendant pleaded limitation by reason that the suit was not brought within six years from the time the plaintiff's cause of action arose upon the default to pay the instalment due upon the 10th December 1857. On the other hand, it was contended for the plaintiff, on the authority of the decision in the case of *Hollodhur Bangal*, that the payments made and accepted after the first default, indicated a waiver of the condition by which a right of action arose on such default, and, consequently, that all the instalments falling due within the six years next before suit might be recovered. It appeared on the trial that the money for which the note was given, had not in fact been lent to the defendant Balfour as a principal, but to Wilson another of the joint makers, by whom all the payments on the note had been made, and for whom the defendant Balfour was only a surety, and recognized as such by the plaintiff, and that no demand had been made on Balfour for any payment until subsequently to the year 1861, when Wilson obtained his discharge from all his liabilities under the Insolvency Act.

The plaintiff's suit was brought in the Calcutta Court of Small Causes, and on a difference of opinion between two of the Judges on the point of limitation, the case was referred for the opinion of the High Court, and was argued before NORMAN, J., by whom the following judgment was delivered:—"I am of opinion that the plea of limitation is a good answer to this action. The language of the promissory note is peculiar. It is a promissory note for the payment of a certain sum by thirty-five instalments, with a proviso that 'in case of default 'in payment of any one of the instalments, or of any part of any 'one thereof, and notwithstanding the same be afterwards paid, 'the monies intended to be secured by this promissory note, or 'such part thereof as shall then remain unpaid, shall forthwith 'become immediately due and payable, and may be immediate-'ly or any time thereafter sued for and recovered, anything

herein mentioned notwithstanding.' The note is therefore payable by instalments only until default. Upon the first default the whole remaining balance is to become due. There is no provision for any continuing liability to pay at stated intervals, and there is a stipulation which in effect provides that a default shall not be waived. As this stipulation was evidently made for the protection of all parties, the sureties as well as the creditor, I am of opinion that there could be no waiver by the creditor so as to affect the position of the defendant who is a surety. There was a default in payment of the instalment due upon the 10th December 1857, and the plaintiff's cause of action arose immediately upon the failure to pay that instalment. The obligation to pay by instalments wholly ceased on the first breach, and the whole sum secured by the note became at once due. I am of opinion that the plaintiff's only cause of action is that which accrued upon the first breach, and therefore that the claim is barred by limitation."

The following cases illustrate the operation of this Section in extending the term for the execution of decrees. A decree having originally passed on the 9th September 1840, execution thereon was from time to time taken out. Upon the 18th of July 1863, the judgment-debtor's property being then under attachment, she filed a petition in which she admitted the debt, and prayed that as she had come to an arrangement with her creditor, the attachment on her property might be removed. The decree-holder's consent to this arrangement was endorsed on the back of the petition and the attached property was accordingly released. On a subsequent application for execution the judgment-debtor pleaded limitation, on the ground that her admission of the debt did not bring the decree-holder within time under the provisions of Section 20, Act XIV of 1859, since that Section, unlike Section 19 of the same Act, makes no reference to admissions as giving a decree-holder a fresh starting point from which to reckon limitation. The Zillah Judge to whom the application was made,

allowed execution to issue; and on appeal, his order was confirmed by the High Court in the following judgment:—"We may concede that Section 19, has nothing to do with this suit, and that the wording of Section 20 might, under ordinary circumstances, bear the meaning attached to it by the judgment-debtor. But in this case the debt was admitted after execution had been taken out in 1863. No objection was then taken that the proceedings were barred by limitation; and whatever laches there may have been then on the part of the decree-holder, were condoned by the act of the debtor in admitting the claim and begging for time wherein to pay. This gives, we consider, a fresh starting point from which execution should be dated; and as the present execution was taken out in 1864, there can be no question but that it was fully within time." *Saroda Pershad Roy* v. *Digumburee Debea. W. R. Misc. App. III.* 27.

A decree having been passed on the 4th December 1856, execution was applied for on the 1st June 1864, when notice was given to the judgment-debtor, who by a petition dated the 21st July 1864, admitted a part of the decree-holder's claim and agreed to pay the amount which he admitted. The Court held that by so doing the judgment-debtor had condoned the laches of the decree-holder, to whom a fresh starting point was given by his debtor's admission, and consequently that execution might issue. *Shudasheo Singh* v. *Luchmee Narain. W. R. Misc. App. V.* 12.

Where upon a petition for the revival of execution a debtor's property was attached for sale, and the debtor, being arrested in execution of the decree, filed a petition admitting his liability, and asking to be released on the ground that his debt might be realized from the sale of the attached property, it was held on the authority of the case last cited, that the debtor had debarred himself from pleading that the petition for revival of execution was filed more than three years after the last effectual step taken to keep the decree alive. The

Court observed that such an admission by the debtor, and such a condonement by him of the laches of the decree-holder, if such there were, prevented the question of limitation from being taken up in the case. *Kashee Kant Bhuttacharjee* v. *Prossonno Coomar Roy Chowdhry. W. R. Misc. App. V.* 31.

SECTION 5.

Computation of period of limitation in suits to recover property purchased from depositaries, pawnees, or mortgagees.

In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase.

Proviso.

Provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by Clause 15, Section I.

THIS Section must be read in connection with Section 2, and with Clause 15 of Section 1.

With respect to the words, "trustee, depositary, pawnee, or mortgagee," the Indian Law Commissioners in the 37th Paragraph of their Report, dated the 25th March 1843, upon the Draft Limitation Act at that time under the consideration of the Legislature, observe :—"By the term 'trustees' we mean what "is popularly, and, in general, technically understood by it, "namely, persons to whom property is conveyed in trust for "specific purposes by wills, settlements, and other formal deeds. "By 'depositaries,' we mean persons holding possession of "moveable property originally delivered to them to be kept for "the owner, or in pledge as security for a debt, in contradistinc-"tion from 'mortgagees', or persons holding immoveable prop-

"erty in pledge. Seeing, however, that the term depositary' "may be construed in a more limited sense than we intended, "we propose to add the word 'pawnee' to meet expressly the "case of moveable property pledged for a debt."

The terms of this Section are not very explicit as to the duration of the periods of limitation which they are intended to prescribe and it is not easy to determine the effect which should be given to them. The first part of the Section provides that in suits for the recovery from the purchaser, or any person claiming under him, of any property purchased *bonâ fide*, and for valuable consideration, from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase. It is not here said whether as against such *bonâ fide* purchasers a different rule of limitation is to be applied from that which is provided for suits brought directly against trustees, depositaries, pawnees, or mortgagees, or against those who have purchased from them otherwise than *bonâ fide*. It may however be reasonably presumed that the intention of the Legislature in declaring that a new cause of action should be deemed to arise in cases of *bonâ fide* purchase, was to restore in such cases, and in such cases only, the operation of the general rules of limitation prescribed by the Act, as opposed to the special provisions of Clause 15, Section 1, and of Section 2. For example, where A deposits moveable property with B, which C afterwards purchases from B, *bonâ fide* and for valuable consideration, A's right of action as against B, for the recovery of such property will continue good—under Clause 15, Section 1,—for thirty years; but the right of action which accrues to A as against C from the date of C's purchase, will be subject to the ordinary rule of limitation of six years provided by Clause 16, Section 1.

The second part of the Section provides that in the case of purchase from a depositary, pawnee, or mortgagee, no suit for the recovery of the property shall be maintained unless brought within the time limited by Clause 15, Section 1. This

proviso * has equal reference to cases of *bonâ fide* purchase, and to purchases which are not *bonâ fide*, and its effect is, that in neither case can a suit be maintained after a period of thirty years where the property is moveable, and of sixty years where the property is immoveable.

It will be observed that the proviso contained in the latter part of the Section is silent as to purchases from trustees. The reason of this is, that under Section 2, no maximum time is limited within which suits against trustees must be brought. A trustee by the subsistence of his trust is incapable of adverse possession, and as against him and his representatives, no suit for the recovery of the specific property which is the subject of the trust by those who are beneficially interested therein, can be barred by any length of time. So long, therefore, as the trust property remains in the hands of the trustee or his representatives, the right of action will continue. But the effect of the first part of the Section, as has already been remarked, would seem to place a *bonâ fide* purchaser from a trustee upon a different footing from the trustee himself, and to give such a purchaser the benefit of the ordinary periods of limitation to be computed from the date of the purchase. In this view it must be assumed that a *bonâ fide* purchaser from a trustee is not a representative of such trustee within the meaning of Section 2.

The next point to be determined in considering this Section, is the significance of the words "*bonâ fide* purchase." For

* The Section as it originally stood in the Draft Act submitted to the Legislative Council, did not contain this proviso, which was added when the Bill was before the Council on the 19th February 1859. In proposing the amendment Mr. Currie said:—"The Section as it stands is not quite correct. The maximum time within which suits could be brought against a depositary, pawnee, or mortgagee, under Clause 14, Section 1, of the amended Bill, (Clause 15, Section 1 of the Act,) is thirty years for moveable, and sixty years for immoveable property; so that, as the Section at present stands, if immoveable property were sold after the expiration of fifty-five years, a new term of limitation would commence, and would run for twelve years more, making a total of sixty-seven years, which was never intended: but it was intended that if property was transferred by a *bonâ fide* purchase, the period should be shortened, but not in any case lengthened." See the Proceedings of the Legislative Council of India, for the year 1859. p. 67.

fixing the meaning of these words, reference has sometimes been made to the explanation of the words 'good faith', given in Chapter II, Section 52 of the Indian Penal Code, where it is declared that 'nothing is said to be done or believed in good faith, which is done or believed without due care or attention.' Accordingly, in the case of *Bego Jan* v. *Luteefun*, cited *ante*, p. 128, the Court held that where a purchaser is cognizant of a subsisting trust affecting the property which he purchases, or where by the exercise of due and reasonable care he might have become so, he shall not be considered to be a *bonâ fide* purchaser of such property, entitled to the benefit of the provisions of this Section, but must be held to have taken the property subject to the trust, notwithstanding he may have paid full value for it.

It may, however, be thought that the effect of this ruling has been to some extent modified by the recent decision in the case of *Radhanath Dass* v. *Gisborne & Co.*, *W. R. V.* 253, in which the meaning of the words "*bonâ fide* purchase" as used in this Section, was discussed at great length. The facts on which the decision in this case turned, were of an extremely complicated character, but for present purposes the following general statement of them may suffice. Kunhyaloll, a member of a Hindoo family joint in estate, mortgaged in his own name, to Messrs. Shaw and Hawes, the proprietors of certain indigo factories, lands belonging to the joint family, and subsequently surrendered the right of redemption, and conveyed the lands absolutely to the mortgagees. In the year 1841, the said factories with their dependencies, including the lands in dispute, were purchased by Messrs. Gisborne and Co. Previous to this purchase Kunhyaloll's co-sharers had in various Courts, asserted their title to a share in the said lands, but the litigation had terminated in repeated non-suits upon grounds purely technical. After the purchase, litigation was again resumed, but no decision on the merits was pronounced, until, in a suit for redemption and possession

instituted in the year 1865, by the co-sharers against Gisborne and Co., the plaintiffs obtained a decree. In this case the defendants had denied the plaintiffs' title as co-sharers and had pleaded limitation under the provisions of the Section under notice; but the Zillah Judge finding the plaintiffs' title as co-sharers and joint mortgagors to be established, and finding also that Kunhyaloll's surrender of the right of redemption was without consideration and without the consent of the plaintiffs, held that so far as the plaintiffs were concerned, that surrender was ineffectual. The Judge further held that the defendants Gisborne and Co., having purchased a doubtful title from the original mortgagees, were themselves to be regarded as mortgagees, and consequently were not entitled to the benefit of the provisions of the Section upon which they relied. The case having been brought before the High Court on appeal, was argued before NORMAN and CAMPBELL J. J., by whom it was decided that assuming the lower Court to have been right in considering the plaintiffs' interest to be established, and in determining that the conveyance by Kunhyaloll to Shaw and Hawes was not such a *bonâ fide* conveyance as would deprive the plaintiffs of their right to redeem as against these parties; nevertheless, Messrs. Gisborne and Co., being *bonâ fide* purchasers, within the meaning of the Section under notice, were entitled to plead the ordinary limitation of twelve years from the date of their purchase. The following judgments were pronounced in this case.

NORMAN J.—"It appears to us to be proved that Gisborne and Co. bought that which Shaw and Hawes alleged themselves to possess, namely, an absolute interest in the lands in question. We see no reason to suppose that they may not have fairly believed that the title of Shaw and Hawes as absolute owners was a good one. They knew that such a title had been asserted. We may, and indeed, looking at the matter, cannot but draw the inference that Gisborne and Co. paid a fair price for the lands. We need not trouble ourselves to enquire

whether the cloud over the title, and the litigation which was not unlikely to be renewed, may not have induced Shaw and Hawes to value the lands at a somewhat lower price than they would have insisted upon had the title been entirely unexceptionable. But there is no ground for imputing any want of good faith to Messrs. Gisborne and Co. There is no ground for supposing that they actually knew either that the plaintiffs were co-sharers with Kunhyaloll, or that Kunhyaloll's surrender of the equity of redemption was merely colourable. After this long enquiry we are not absolutely satisfied of our own power to arrive at a correct conclusion on these points. Assuming that Gisborne and Co. knew that the plaintiffs were putting forth claims on such allegations, that they knew that they were buying a disputed title, it will, in our opinion, not affect their right to be considered as *bonâ fide* purchasers, if they dealt honestly, openly, and above board, and were buying what they believed to be a good title. The question then arises, is the suit barred by limitation? In trying the issue of limitation the Judge says that the defendants are mortgagees, and he therefore comes to the conclusion that under Clause 15, Section 1, Act XIV of 1859, the period of limitation is sixty years. Now it is a fruitful cause of confusion and mistake to call things by names which do not properly belong to them. The defendants were not mortgagees, but persons claiming under a purchase from the mortgagees. There was no contract, or express trust as between them and Kunhyaloll, much less as between them and the plaintiffs. The defendants do not fall within the words of the 15th Clause; and whether their case comes within the 5th Section, or not, their position is very different from that of persons who hold simply as mortgagees under an express contract with the mortgagor, or who, as assignees of a mortgagee, undertake the obligations of their assignor. The defendants came in, and have always held and openly asserted their own title as absolute owners hostilely to the mortgagor, and to such title as the plaintiffs claiming to hold jointly

with him, alleged themselves to possess. It may be that the defendants have held under circumstances which would induce the Court to fasten a trust upon them, and to declare that they must be treated as mortgagees, and stand in no better position than if they had been parties to a contract of mortgage. We may assume that upon the facts of this case, if the plaintiffs had sued in proper time, the Court would have declared that the surrender of the equity of redemption by Kunhyaloll, being without the authority or consent of his co-sharers, was not effectual, and that the defendants, having purchased with notice of circumstances which should have put them on their guard, had no greater rights than Shaw and Hawes their vendors. But even in this view it is difficult to see any principle on which they ought to be placed in a worse position, as regards limitation, than if they were mere trespassers. In *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 633, Lord Redesdale says that the case of fraud is very different from that of a trustee who does not perform his trust. 'A person in possession by virtue of a fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by the decree of the Court of Equity founded on the fraud; and his possession in the meantime is adverse to the title of the person who impeaches the transaction on the ground of fraud.' For the appellant, a number of cases (such as *Beckford* v. *Wade*, 17 Ves. 97; *Bonney* v. *Ridgard*, 1 Cox, 145, *Townshend* v. *Townshend*, 1 Cox, 28-34, decided in English Courts of Equity, before the 3 and 4, W. IV. Cap. 27), were cited to shew that though time would not have barred a claim arising from an express trust, yet that constructive trusts were barred by long acquiescence. The case of *Ajoodhyaram Khan* v. *Khemunkeree Dossee*, *S. D. D.* 1859. p. 158, may also be referred to as supporting a similar view. It was shewn that, according to the rules of English Law, though the purchaser of an estate at its full value, taking with notice of a trust, may be liable to the same extent and in the

same manner as the person from whom he purchased, the right must be pursued within the period allowed by the Statute of Limitation (see *Lewin on Trusts*, pp. 557, 560, 573). If the defendants were mere volunteers, who had taken the property without the payment of any consideration; if they had taken with full knowledge of the existence of the mortgage, and of the title of the plaintiffs; or if they had taken secretly and held fraudulently for the purpose of defeating the rights of those whom they knew to be entitled as mortgagors, it may be that they could only stand on the title of the person from whom they took, and probably the plaintiffs might have redeemed as against them within the sixty years allowed by Clause 15. There is one case decided by the late Sudder Court, *S. D. D* 1852. p. 392, and one by this Court, *Marshall's Rep. I.* 391, in which suits to redeem brought against the heirs of mortgagees who had allowed the mortgaged estate to be sold for arrears of revenue, though brought within sixty years,—viz. one after an interval of thirty five years, and the other of upwards of fifty years,—were held to be barred by limitation. We need not now consider whether a mortgagee can, by any act or omission on his own part, alter his position as regards the mortgagor. The defendants, as we have seen, are not mortgagees; they stand in the position of purchasers from mortgagees for valuable consideration: and if they can be considered *bonâ fide* purchasers, they are protected by Section 5 of Act XIV of 1859. We have shown that it must be taken as proved that they purchased honestly. But the plaintiff's counsel, referring to the language of Lord Hardwicke in *Le Neve* v. *Le Neve*, (see *White and Tudor's Leading Cases*. Vol. II. pp, 33, 34,) says, that purchasing after notice of a prior equitable right, makes a person a *malâ fide* purchaser. The proposition is perfectly correct, but is not applicable to the facts of the present case. Fraud or no fraud is a question of fact, and as Lord Hardwicke says in the same case, 'fraud is the true ground on which a Court of Equity is governed in questions of notice.' It was

also contended for the plaintiffs, that a purchaser is bound to take all reasonable precautions; that Gisborne and Co. should have looked beyond the title of their vendors; that they were bound to take notice that Kunhyaloll was member of a joint family; that there were circumstances which should have put them upon enquiry whether the equity of redemption had been effectually surrendered or not; that the defendants had voluntarily shut their eyes, and could not therefore be treated as *bonâ fide* purchasers. Now in construing the Section in question, we must remember that the terms "*bonâ fide*," "for valuable consideration," and "without notice," as applied to purchasers of real and other property, are all of them perfectly familiar and well understood by all English lawyers. As we do not find the words "without notice" in the Section, we cannot but suppose that the omission was intentional; indeed we think that the Legislature could never have contemplated that honest purchasers should be deprived of the protection given under this Section, but which was probably not created for the first time by this Section, merely by constructive notice, or notice of doubtful claims or equities. If the defendants at the time of the purchase had actual knowledge of the existence of the alleged rights of the plaintiff; if they designedly abstained from making enquiries for the purpose of avoiding knowledge; if it appeared they had a suspicion of the truth, and fraudulently determined not to learn it; if there had been any concealment or subterfuge, any attempt to misrepresent the circumstances of the purchase, or of the title,—the inference would be that the purchase was not an honest one, and therefore not *bonâ fide* within the meaning of Section 5. We have shewn that in the present case there is no imputation whatever on the perfect good faith of the appellant's purchase. We are therefore of opinion that the suit is barred by Section 5, of the Limitation Act, and that the decree of the Court below must be reversed."

CAMPBELL J.:—"As respects the circumstances of Messrs. Gisborne and Co's purchase, the facts seem to be clear. The sellers

gave no covenant of title; they did not even specifically sell the estate now in dispute; it went under the general designation of 'dependencies' of the indigo factory; so far the purchasers might be considered as mere assignees of the mortgage. But when we look to the title deeds handed over to them, and which we must suppose them to have looked at, it appears from these papers that the sellers had asserted their absolute right to the estate; that the plaintiffs had claimed their shares, had brought actions to assert their right, and had recently been nonsuited, and that the sellers had then been recorded as proprietors. Messrs. Gisborne and Co. may therefore be taken to have bought a doubtful title with knowledge that a claim was hanging over it,—a title which was originally one of mortgage which had never been regularly foreclosed, and which had only been completed by a voluntary surrender by the head of the family now seeking to redeem. In fact, Messrs. Gisborne and Co. were challenged and put on their defence, very soon after their purchase; and it may seem hard on the plaintiffs whose delays may naturally have resulted from the exhaustion of successive defeats on non-suits, that they should be now shut out. But we are unable to consider that. We must put out of sight the non-suited litigation, and must merely consider whether the plaintiffs were in law bound to bring their present action against Messrs. Gisborne and Co. within twelve years. That entirely turns on the construction of Section 5, Act XIV of 1859. Were Messrs. Gisborne and Co. *bonâ fide* purchasers? If they either knew that the plaintiffs were the rightful owners, or wilfully shut their eyes, they would not be *bonâ fide* purchasers from the mortgagees. That there was no actual bad faith, or fraud on the part of Messrs. Gisborne and Co. is, I think, beyond doubt. They purchased an estate with a doubtful title for what it was worth, but they neither knew, nor had the means of knowing that the plaintiff's claim was a good claim. They had no knowledge of, nor dealings with the plaintiff's family; they had been no parties to the prior

transactions regarding the estate. If they made any enquiry regarding the plaintiffs' claim, they would only learn that it was a doubtful and difficult case, the issue of which must be very uncertain. The plaintiffs were not recorded as proprietors, and the circumstances were such that as honest men, the defendants might fairly have defended an action, and put the plaintiffs to their proof. That being so, I think that, though they might not be *bonâ fide* purchasers without notice, who could at once defeat a *cestui que trust*, they were *bonâ fide* purchasers within the meaning of the Law of Limitation; that is, they were parties who purchased honestly without actual fraud. The policy of the Law seems to be that doubts should not hang for ever on titles; that if a man, without fraud or concealment, purchases a doubtful title, it must be attacked within twelve years or never. To make a purchase *bonâ fide*, the purchaser must have reasonable ground for believing that he buys a good title, although he may know that it is liable to attack. In this case we think that Messrs. Gisborne and Co. may have reasonably believed that they took a title which they could as honest men defend. In that light we have considered them *bonâ fide* purchasers, and on that ground I concur in dismissing the suit as barred by limitation, although I confess that I have had much doubt and hesitation about the case."

In connection with the decision in the above case, and as illustrating the manner in which the old Law of Limitation was held to operate in cases of alleged fraud, reference may be made to the judgment of the Privy Council in the case of *Sheikh Imdad Ali* v. *Musst. Kootbee Begum*, 3 *Moore's I. A. Cases*, p. 1, in which it was held that under Clause 3, Section 3, Regulation II of 1805, acquisitions of immoveable property which have been made under a title believed to be just and valid though in reality insufficient, are protected by twelve years' possession; and that as fraud and dishonesty are not to be assumed upon any ground however probable, a plaintiff to avoid the effect of lapse of time must establish the existence of conscious injustice by proof.

The judgment of the High Court in the case of *Sulehoonissa Khatoon* v. *Khyroonissa*, *W. R. V.* 238, may be referred to, as touching upon various questions—relative to constructive trusts and to *bonâ fide* purchase—arising out of the Section under notice, but not as finally determining any of them.

The question whether fraud must necessarily be imputed to a mortgagor who suffers the mortgaged lands to fall into arrears of revenue, and afterwards buys them in at the Government sale, has already,—*ante*, p. 112,—been noticed, and the opposition in the decisions upon the point adverted to. In the recent case of *Ajoodhyaram Khan* v. *Nawab Sidhee Nazir Ali Khan*, *W. R. Privy Council Cases. V.* 83, the same and similar questions were very fully considered by their Lordships of the Privy Council. The circumstances out of which this suit arose were the following. A, the mortgagee of certain lands belonging to the plaintiff's zemindary, entered into an agreement with M to allow the Government revenue of the mortgaged lands to fall into arrears, with the view that the lands might be sold by Government at auction sale for arrears of revenue, and purchased by M if the sale price should not exceed three lakhs. It was further stipulated that if the lands should sell for less than three lakhs, M should pay to A the difference between that sum and the sale price ; and that A should not bid at the sale. This agreement was dated the 15th April 1848, but did not become known to the plaintiff until the year 1852. The lands were sold for arrears of revenue some time in the month of May 1848, and were bought by M. On the 30th May 1860, the plaintiff instituted a suit for redemption, and for possession consequent on redemption, in which suit in addition to A and M, two others were also made defendants, as being in fraudulent and collusive possession of the said lands. Among other pleas the defendants pleaded limitation, both under the general twelve years' rule as laid down in Section 14, Regulation III of 1793, and under the special law of Section 24, Act I of 1845, inasmuch as the plaintiff's

suit, which was in fact a suit to set aside the sale of the zemindary at the sale for arrears of revenue, had not, as required by that Section, been brought within one year from the date when the sale took place. The suit was accordingly dismissed by the Court of first instance as barred by limitation; but it was held by the High Court, on appeal, that the suit was not brought to set aside the revenue sale, and that it was not barred by limitation. The Court considered that A and M could not allege their own wrong, and that a trust might be fixed on M's estate in favour of the plaintiff, without disturbing the Government sale. The case was accordingly ordered to be remanded for trial on the merits. Against this decision an appeal having been brought before the Privy Council, their Lordships held that as the title and possession of the defendants were expressly alleged to have been founded in fraud, the plea of limitation under the general twelve years' rule could not be maintained. With reference to the other plea of limitation, under Section 24, Act I of 1845, their Lordships observed:—"This objection necessarily supposes the suit to be brought to set aside the revenue sale. This remedy, however, the plaintiff does not seek, but relying on the agreement of the 15th April 1848, antecedent to the sale, he claims a right, as it were to confess and avoid that sale by imposing a trust upon the estate which passed under it. The question therefore as to this period of limitation is, whether the plaintiff can in point of law insist, notwithstanding the Government sale for arrears of revenue, that as against him that sale should be viewed as a private sale. To argue that the plaintiff's remedy under Act I of 1845, is for damages only, is to assume the very question under discussion, which is, whether the Act extends to the present case." After referring to the decisions of the late Supreme Court as establishing that a fraudulent purchase by a mortgagee at an auction sale for arrears of revenue of the mortgaged lands will not defeat the equity of redemption, their Lordships

expressed themselves to the effect, that stripped of all its disguises and looked at as it really stood, the sale as between A and M was meant to be under the terms of their agreement, and was not really meant to be a sale under the Revenue Law for arrears, that part of the transaction being merely a fraudulent device. These parties were consequently precluded by their acts from setting up as against the plaintiff whom they intended to defraud and who was a stranger to their agreement, the illegality of the agreement itself. The plaintiff was entitled to say "this agreement is the real contract", and to treat the transaction as a private conveyance; and under a private conveyance, under the circumstances alleged, the lands conveyed by A to M would have been redeemable by the plaintiff. In this view their Lordships were of opinion that the suit was not barred under Act I of 1845. "This decision" their Lordships observed, "proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to an interest derived under a real auction sale."

SECTION 6.

Computation of period of limitation in suits in Supreme Courts by mortgagee to recover immoveable property mortgaged.

In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

THE effect, of this Section * when read together with Clause 12 of Section 1, was to give a mortgagee suing his mortgagor

* This Section was not contained in the Draft Act originally submitted to the Legislative Council, but was introduced on the motion Sir J. Colvile when the Bill was in Committee. It was proposed apparently without ex-

in the late Supreme Court, for possession of immoveable mortgaged property, twelve years from the latest payment on account of the mortgage debt within which to bring his suit. Under the Charter of the High Court, the provisions of the Section will be applicable in suits brought before that Court in the exercise of its ordinary original civil jurisdiction.

In declaring that the cause of action shall be deemed to arise from the latest payment on account of the mortgage debt, only in suits brought in Courts established by Royal Charter, the Legislature may be presumed to have intended that in similar suits brought in Courts not established by Royal Charter, the cause of action shall not be deemed to arise from the date of such payments on account. The limitation of suits by mortgagees for possession brought in the latter Courts will be governed by Clause 12 of Section 1, and will run from whatever date the mortgagee was first entitled to possession. Under Section 4, however, a written acknowledgment signed by the mortgagor will give the mortgagee a new period of limitation, in whatever Court his suit may be brought.

SECTION 7.

Computation of period of limitation in suits to avoid incumbrances or under-tenures in estates sold for arrears of Government Revenue.

In suits to avoid incumbrances or under-tenures in an estate sold for arrears of Government Revenue due from such estate or in a Putnee Talook or other saleable tenure sold for arrears of rent which by virtue of such sale becomes freed from incumbrances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, talook, or tenure became final and conclusive.

THIS Section has special reference to the Laws which regulate the sale of estates for arrears of Government Revenue.

planation, and agreed to without discussion or comment. See the Proceedings of the Legislative Council of India for the year 1859. p. 58.

Section 37, Act XI of 1859 declares that in the Provinces of Bengal, Behar and Orissa, the purchasers of estates sold under the provisions of the Act for arrears of Government Revenue, shall acquire such estates free from all incumbrances created after the permanent settlement, and shall be entitled to avoid all under-tenures, with certain specified exceptions. Section 27 of the same Act fixes the time when sales under the provisions of the Act become final. The period of limitation applicable to the suits referred to in this Section will be that of twelve years as provided in Clause 12 of Section 1.

No cases illustrating the operation of the Section seem to have been reported; but as the rule under the old Law of Limitation was apparently the same as that which this Section prescribes, reference may be made to the decisions of the Sudder Court (cited in *Macpherson's Civil Procedure. 4th ed. p.* 75,) as affording precedents for the construction of its provisions.

Section 8.

Computation of period of limitation in suits between merchants for balances of accounts current.

In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at and the period of limitation shall be computed from the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts.

Various cases have already been referred to in which it has been held that the parties have *not* had 'mutual dealings,' with one another, within the meaning of this Section. Reference may more particularly be made to the cases of *Doyle* v *Edoo Gazee*, cited *ante*, p. 52, *Ramnarain Chowdhry* v. *Bhugwan Jogey*,

p. 51; and *Nobokristo Bhunj* v. *Rajballubh Bhunj*, p. 177. The case of *Bhoyro Doss* v. *Kallypersaud Augurwallah*, reported in the 'Englishman' of the 4th May 1863, decided by MORGAN J. on the 30th April of that year, illustrates clearly the character of the dealings to which this Section is intended to apply. In this case it appeared that the parties to the suit were merchants, or traders, and that there was an account current between them, for the balance due upon which, the plaintiff sued. This account was, on one side, of money from time to time lent, and of the price of a shawl sold to the defendant, and, on the other side, of payments made by the defendant to the plaintiff. The plaintiff stated, that he used to lend the defendant money and take hoondees from him, which were sometimes discounted, and at other times carried to the defendant's account in the plaintiff's books. The Court held that this was not "an account between merchants and traders, who have had mutual dealings," such as to entitle the plaintiff to compute limitation from the close of the latest year of the account. "The dealing between the plaintiff and the defendant consisted in the loan of sums of money by the former, and of payments on account by the latter. There was no dealing between them of any kind to raise a cross demand by the defendant against the plaintiff, in respect of goods sold or other matters. There was therefore no reciprocal dealing between them; and the plaintiff is consequently not entitled to avail himself for the purpose of instituting this suit of the mode of computing the time of limitation provided by Section 8, Act XIV of 1859." The suit was accordingly held to be barred by lapse of time.

SECTION 9.

Computation of period of limitation in case of concealed fraud.

If any person entitled to a right of action shall by means of fraud have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing

such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it or when he first had the means of producing or compelling the production of the concealed document.

SECTION 26, Act VIII of 1859, directs that where the plaintiff sues upon a cause of action which has accrued beyond the period ordinarily allowed by any law for commencing a suit of the nature brought, the ground upon which exemption from the law is claimed shall be stated in the plaint. This provision corresponds with that contained in Clause 2, Section 3, Regulation II of 1805, which requires that the plaintiff in his plaint or replication shall set forth distinctly the grounds on which he claims an extension of the ordinary period of limitation. Upon the analogy of the cases decided with reference to the provisions of that Regulation, it would appear that where a plaintiff upon the ground of fraud seeks to have his suit exempted from the operation of the ordinary rules of limitation, and to be disposed of as governed by the special rule contained in the Section under notice, he must distinctly set forth in his plaint the particular fraudulent dealing on the part of the defendant by which he has been injuriously affected, and not merely state in a general way that he has been defrauded. See the cases of *Rasmonee Dabea* v. *Brindabun Surma, Hay's Rep. I.* 6; *Ramkanye Doss* v. *Kishen Chunder Roy. Hay's Rep. I.* 55; *Marshall's Rep. I,* 22; *Kashee Chunder Sein* v. *Tarakinkur Roy. Hay's Rep. I.* 325; *Shoomotee Dossee* v. *Biprodoss Chuckerbutty. Hay's Rep. I.* 377.

In the recent case of *Robert & Charriol* v. *Lombard, Indian Jurist Rep. N. S. I.* 192, the plaintiffs, who were French merchants carrying on business in Calcutta, sued the defendant, the French consul in Calcutta, for defamation of character. The injurious expressions for which damages were sought, had been used by the defendant in certain letters written by him to the Minister of Marine in France, in relation to a dispute which had arisen between the plaintiffs and the master of a French ship which the plaintiffs had chartered, but had afterwards refused to load upon the ground that she was not seaworthy. In these letters the defendant had expressed an opinion that the vessel was not really unfit to proceed to sea, and had imputed bad faith to the plaintiffs for not fulfilling their contract. The whole of these letters were despatched by the defendant, and received by the French Minister of Marine in the autumn of 1861. The plaintiffs having indirectly learnt that reports adversely affecting their character had been forwarded to the French Government by the defendant, applied to him for copies of his letters which he refused to give, on the pretext that the rules of the consular service of France forbade him to give copies of official correspondence. Further applications to the same effect made to the Authorities in France, were for a long time equally unsuccessful, but eventually in April 1863, the plaintiffs were permitted by the French Minister of Marine to see and copy the defendant's despatches. The plaintiffs instituted their action against the defendant for defamation on the 11th February 1864. For the defendant it was contended that the suit was barred by limitation, under Clause 2, Section 1, Act XIV of 1859, inasmuch as it had not been brought, as that Clause directs, within one year from the time when the plaintiffs' cause of action arose, *i. e.*, from the publication of the alleged libellous letters by their transmission to the French Minister. In reply to this objection it was urged for the plaintiffs that even if their cause of action should be taken to have arisen at the time contended for by the defendant, still, as the defendant

by refusing them leave to peruse, or obtain copies of his letters, had kept them from the knowledge necessary for founding their action, the case must be held to fall within the provisions, of the Section under notice.* It was argued that to make a libellous charge, and then improperly to conceal it so as to avoid disclosure,—to make imputations against another, and at the same time to withdraw from him the means of confuting them,—was a fraud in the sense intended by the Section referred to. On the other hand, it was urged for the plaintiffs that the terms of the Section point only to cases in which the defendant has deprived the plaintiff of some transmissible right, and has by fraud concealed from him something necessary to establish his title, but have no reference whatever to a case in which the only right is a right of action against the defendant for damages. The plaint was not founded in fraud and there was no evidence of fraud. Fraud is the deceitful, unconscientious concealment of some right. But the defendant had not concealed the fact that he had made reports, nor had he concealed the nature of these reports. In the exercise of a public duty he had refused to communicate them. He had considered all communications made to his Government to be confidential, there was therefore no duty to reveal them, and no fraud in concealing them.

In determining the issue thus raised, PHEAR J. expressed himself as follows. "The spirit of the Section certainly seems to cover the case before me. The plaintiffs could not bring their suit until they had, with considerable approximation to accuracy, obtained the words of the despatches, notwithstanding that they were perfectly satisfied that they had a good cause of action against the defendant; and the refusal of the defendant to let them know what the contents of these documents were, amounted practically to an entire concealment from them, in spite of

* The defendant's plea of limitation was attempted to be met by a variety of other arguments besides the one indicated above, but these do not properly fall to be considered in connection with the Section under notice.

their best efforts at discovery, for a longer period than the period of limitation, of the materials upon which alone they could base their suit. It seems to me that the spirit which dictated this Section would say that under such circumstances time ought not to be allowed to run against the plaintiffs. But I feel bound to add that I do not think that the actual words of the Section extend to this case. The first part of the Section does not apply, because the plaintiffs certainly knew at an early period that they had been defamed by the defendant. Their difficulty was to ascertain the precise character of the defamation. As to the second part of the Section, in the first place I doubt whether the words 'document necessary for establishing such right of action' were intended to embrace more than such documents as are essential to establish the civil right alleged to have been infringed; they hardly seem to me to extend to evidence of the breach; but secondly, I cannot go so far as to say that the defendant has 'fraudulently concealed' his despatches from the plaintiffs." After commenting upon the conduct of the defendant in refusing to communicate to the plaintiffs the injurious reports which he had made against them, and declaring it to be dishonourable if measured according to ordinary social standards, the learned Judge continued. "But this is not enough. To bring the defendant's conduct within the scope of the Section, it must be taken one step further. It must be fraudulent. But if so, there must have been such a moral duty incumbent upon the defendant to disclose the wrong which he has done, as a Court of Equity would have enforced had its aid been duly sought,—as might be the case if the concealment were effected with the direct purpose of throwing the plaintiff over the period of limitation prescribed by the Act, and so of depriving him of his right of suit. Now as to this, it is, I think, enough to remark that the disclosure would have had the effect of subjecting the defendant to risk of indictment for defamation, and a Court of Equity will not oblige a man to furnish materials for a criminal charge against himself. I there-

fore think that there has not been in law, such a fraudulent concealment on the part of the defendant as will give the plaintiffs the benefit of Section 9 of Act XIV. Consequently there is no restraint on the operation of Clause 2 of Section 1, and by that the plaintiffs are barred."

SECTION. 10.

Computation of period of limitation in suits where the cause of action is founded on fraud.

In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.

THE terms of this Section do not expressly provide for the case of a defendant who has purchased in good faith and for valuable consideration. It is conceived, however, that as against such a purchaser, the cause of action should be deemed to have arisen from the date of the purchase, in the same manner as provided in Sections 5 and 9.

In the original Draft Act of the Indian Law Commissioners, after the words "at the time at which such fraud shall," were added the words "or with reasonable diligence might." These words were afterwards omitted, apparently upon the ground that the decision as to when a party might with reasonable diligence have become acquainted with the fraud practised upon him, must almost always depend upon conjecture rather than actual proof.*

Where B obtains money from A upon the fraudulent representation that he is the agent of C, A's cause of action shall be taken to have arisen on the discovery of B's fraud. *Subharamareddi* v. *Bhimaraju Ramaya. Madras High Court Rep. II.* 21.

Where a plaintiff under the old Law of Limitation sued to set aside certain deeds as fraudulent, alleging that he had

* Reports of the Indian Law Commissioners for the years 1843-1844, p. 10.

only recently become aware of their existence, and it appeared from the evidence that he was not ignorant of the existence of the deeds which he sought to set aside, at a period more than twelve years prior to the institution of his suit, it was held that the suit was barred by limitation. *Sahebpersad Singh* v. *Ram Bahadoor Singh. Hay's Rep. I.* 465.

In the case of *Heeraloll Shaha and another* v. *Jadub Chunder Chenchey, Coryton's Rep. I.* 119, the plaintiffs, in the year 1864, instituted a suit for the recovery of possession of a piece of land, from which, they alleged, that the defendant had fraudulently dispossessed them. The defendant, on the other hand, claimed to hold the land in dispute by purchase from one Parbutty, aunt of the first, and mother of the second plaintiff. It appeared from the evidence that at the time of the defendant's alleged purchase, his vendor Parbutty was a widow. The defendant pleaded limitation. In determining this issue, PHEAR J. is reported to have said :—"As to the lapse of time, although there is a little vagueness as to the exact period of dispossession, I think there is no doubt but that it occurred more than twelve years before the bringing of the suit, and that even any additional time which may have been saved to the plaintiffs, or either of them, by reason of minority, has expired. But the view I take of the case renders it unnecessary to enquire into this question. In a Court of Equity a defendant cannot claim the benefit of the Statue of Limitations upon a possession which has been acquired by fraud, whether constructive or actual, unless the plaintiff has been guilty of such laches as to disentitle him to invoke the interference of the Court. Here, by the defendant's own account, the possession on which he relies, was obtained under and by virtue of the sale from Parbutty, a Hindoo widow. Now I need hardly say that in the case of a purchase from a Hindoo widow, the question whether or not the widow has in fact the power of alienating land, can only be rendered unimportant by the existence of the fact that the purchaser did *bonâ fide* enquire as to that power, and did

reasonably satisfy himself that the circumstances were such as to confer it upon her, and if he did not so enquire, and the widow did not possess the power, then the pretended purchase is void, and is liable to be set aside at the instance of the heirs, as an act of constructive, if not of actual fraud, even though the period of limitation for suits may have elapsed."

The view intimated in the above remarks seems open to doubt. The Indian Limitation Act, as it expressly provides for the case of frauds, does not stand in need of, nor admit the application of equitable constructions. By the Section under notice it is expressly declared that in suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have arisen at the time when such fraud shall have been first known by the party wronged. In the case of *Heeraloll Shaha*, therefore, it is submitted that the material question to have been considered by the Court in determining the issue of limitation was, at what time did the plaintiffs become aware of the defendant's fraudulent dealing? since if they were aware of it at a time more than twelve years before the institution of their suit, their claim was barred under the ordinary rule provided by Clause 12, Section 1. On this subject reference may be made to the observations of PEACOCK C. J. in the case of *Poresh Narain Roy* v *Watson & Co.*, *W. R. V.* 283, where he says:—"The Law of Limitation in this country being express, dishonesty in obtaining possession will not prevent the possessor from availing himself of the provisions of that Law." Reference may also be made to the judgment of the Madras High Court in the case of *Peddamuthulaty* v. *N. Timma Reddy, Madras High Court Rep. II.* 270, in which it was observed:—"In considering the application of the doctrine of laches, it must not be forgotten that the Limitation Act is here applicable to all suits; that while, until very recently, the English Courts of Equity only dealt with lapse of time in analogy to the Statutes of Limitation, in this country the Act applies to all suits." See also to the same effect the case of *Rama Rau* v. *Raja Rau, Madras High Court Rep. II.* 114.

SECTION 11.

Computation of period of limitation in case of legal disability.

If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

PERSONS who had attained majority before the passing of Act XIV of 1859, are not entitled after the Act came into operation to avail themselves of the old rule of limitation in respect of majority,* but must within three years from the time of attaining their majority bring their suits upon any cause of action which may have accrued, and in respect to which the term of limitation has run while they were under a legal disability to sue. *Goluck Chunder Chuckerbutty* v. *Radhamonee Dossee*, *W. R. I.* 52.

This Section was not intended to place minors under a special disability as contrasted with persons who are not minors, but to make a special concession in their favour. A party coming into Court after attaining his majority, if he is within

* With respect to the old rule of limitation in cases of disability from minority and other causes, *See Macpherson's Civil Procedure. 4th ed.* p. 90.

the ordinary terms of limitation provided by Section 1, is not bound to avail himself of Section 11. Section 1 is complete in itself and applies to all suits. Section 11, is an additional or supplementary provision, giving minors liberty to take a fresh start in computing limitation from the time of their attaining majority, provided that the privilege so accorded is limited to three years. For instance, where the prescribed period of limitation is twelve years, and the plaintiff's time for suing computed from his original cause of action, accruing in his minority, has also expired during his minority, or has less than three years to run at the time when he attains majority, he will have full three years within which to sue after he attains majority. But where the prescribed period has not so expired, and there are more than three years of the period of limitation still to run after the plaintiff attains majority, he may bring his suit at any time within the period remaining to complete the prescribed term of twelve years. So if there be six years of a term of twelve years still to run when the plaintiff attains majority, he will have six years to sue in under the ordinary rule, and is in no way compelled by the provisions of Section 11, to bring his suit within three years. *Kalee Doss Chatterjee* v. *Beharee Loll Mookerjee*. *W. R. II.* 305. See to the same effect, *Soorodhuny Dossee* v. *Bissumbhur Sircar*. *W. R. III.* 21; *Abbas Ali* v. *Hurish Chunder Nag*. *W. R. V.* 204; *Luchmun Singh* v. *Bibee Miriam*. *W. R. V.* 219.

There is nothing to prevent a minor, when he comes of age, from proceeding upon any cause of action which his guardian, either through inadvertence or negligence has omitted to prosecute, for if the law were otherwise no minor would be safe. *Koylash Chunder Sircar* v. *Gooroo Churn Sircar*. *W. R. III.* 43. Compare the cases of *Bhyrub Indernarain Race* v. *Rance Bhoobun Maye*. *S. D. D.* 1848, pp. 513, 676; *The Rajah of Burdwan* v. *Ram Jadub Ghose*. *S. D. D.* 1850, p. 157; *Zigmooz Zumman Chowdree* v. *Faqueerooddeen Mahomed Ahsan Chowdree*. *S. D. D.* 1852, p. 966.

In the case of *Anund Nath Roy Chowdhry* v. *Huro Soonduree Chowdhrain, W. R. III.* 8, it was held that a party who was a minor when an order was passed under Section 246 of Act VIII of 1859, disallowing an application made on his behalf by a '*Khair-khwah*' or 'well-wisher' to stop the sale of certain lands attached in execution of a decree, may sue within one year after attaining majority to have the order set aside, the Court being clearly of opinion that Section 11, Act XIV of 1859, will in such a case apply to and modify Section 246, Act VIII of 1859.

The Revised Draft Act for the Limitation of Suits submitted by the Indian Law Commissioners to the Legislature with their Report dated the 1st October 1842, contained a provision that for the purposes of the Act the term of infancy should in all cases be taken to extend from birth to the end of eighteen years. This provision was unfortunately not embodied in the present Act, and questions have in consequence arisen as to the time at which minority should be held to terminate.

By Section 28, Regulation X of 1793, the minority of Hindoo and Mahomedan proprietors of estates paying revenue to Government was limited to the expiration of the fifteenth year; but by Section 2, Regulation XXVI of 1793, this rule was rescinded, and the minority of such proprietors was declared to extend to the end of the eighteenth year. In the case of *N. P. Pogose* v. *Bykantnath Roy Chowdhry, W. R. V.* 2, the question was discussed, whether the terms of the Section last cited extend the period of minority in the case of proprietors of estates, generally, and in relation to all contracts, to the end of the eighteenth year, and prolong the period of legal disability to that age, or whether they merely extend minority in matters connected with the minor's real estate, leaving him in all matters of personal contract in the same position in which he was before the Section was enacted, namely, a minor only to the end of the fifteenth year. In determining this point the Court observed:—" We think that the question admits of one an-

swer only. Minority is a legal personal disability. It may be placed arbitrarily at one age or another. But having been determined to extend either generally or as to a particular class up to a certain age, it is accompanied by complete disability, unless the law has expressly declared otherwise. Now the words of Section 2, Regulation XXVI of 1793, clearly extend the term of minority to a class of persons, but do not limit it to a class of subjects. We have no doubt therefore that they extend the legal disability attending minority to any act of a proprietor of estates under the full age of eighteen years. The reason of the thing supports the law as we read it; since it is unnecessary to remark upon the unreasonableness of finding the same person a minor as to some transactions and a major as to others, liable on account of some, non-liable on account of others."

In the case of *Ranee Roshun Jahan* v. *Rajah Syud Enaet Hossein*, *W. R. V.* 4, the Court held that the extension of the period of minority, to the eighteenth year under Section 2 Regulation XXVI of 1793, was applicable to proprietors out of possession, as well as to those in possession of lands paying revenue to Government.

But where the plaintiff is not a proprietor of land paying revenue to Government, and the subject matter of litigation is not an estate held under Government, the rule as to the period of minority is different. In the case of *Juggessur Hati* v. *Deobo Moyee Dossee*, *W. R. I.* 75, it was held by the High Court on appeal, that as in all matters unconnected with the possession of estates held under Government, the minority of male Hindoos terminates, according to the Bengal School of Hindoo Law, with the completion of the fifteenth year, the Lower Court was wrong, where the property in dispute was not an estate held under Government, to deduct eighteen years as the period of the plaintiff's minority in computing the term of limitation. In the case of *Monsoor Ali* v. *Ramdyal and others*, *W. R. III.* 50, the plaintiff sued to recover his share of his deceased

father's estate from his brothers, who, as he alleged, had kept him out of it from the time of his father's death. The defendants pleaded limitation. The determination of this issue depended upon the time at which the plaintiff's minority should be taken to have terminated. The plaintiff contended that as under the provisions of Section 26, Act XL of 1858, (an Act for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal,) his minority did not terminate until he attained the age of eighteen years, his suit was in time. The Court, however, held that the words of the Section cited,—"For the purposes of this Act every person shall be held to be a minor who has not attained the age of eighteen years,"—must be taken to restrict the operation of that Section to cases in which the minor's estate is actually taken charge of by Government in the manner provided in the Act; that except in such cases the minority of male Hindoos terminates with the completion of the fifteenth year; and that as the property claimed by the plaintiff was not, and had not been taken charge of by Government, the period of his minority must be held to be governed by the general rule. In giving judgment in this case, PHEAR J. observed that he followed the rule laid down by the Court in the case last cited, but that he entertained doubts as to the correctness of the decision in that case. He thought that if the Legislature could be considered to have used the words in Section 26 of Act XL of 1858, "for the purposes of this Act", as equivalent to "relative to all that forms the subject of this Act," then the limit of minority as regards the exercise of proprietary rights would be fixed at the age of eighteen years for all cases whatsoever, and all cause of anomaly would disappear. It does not appear from the report of this case what kind of property was the subject matter of dispute, but it must be presumed that the estate of which the plaintiff claimed a share, was not an estate paying revenue to Government, since if it had, the provisions of Section 2, Regulation XXVI of 1793, would have applied.

Where a question arose as to the effect of a certificate under Act XL of 1858, the Court held that it was wholly immaterial at what age a girl is by Mahomedan Law considered to be at full age, since for the purposes of that Act every one must be taken to be a minor who has not attained the age of eighteen years. *Oosun Bibee* v. *Mahomed Arsud Chowdhry. W. R. II.* 217.

The terms of the Section under notice require that to entitle the plaintiff to the benefit of the deduction which it provides the cause of action should accrue to him while he is under a legal disability. Where a plaintiff sues as representative of his father upon a cause of action which had accrued during his father's life-time, no deduction can be made in calculating the period of limitation on the ground of the plaintiff's minority. *Nusheeram Roy* v. *Shoshee Bhoosun Roy. W. R. V.* 169. This provision seems open to objection. If a father to whom a cause of action accrues should die immediately thereafter, leaving a minor son, the period of limitation may expire during the minority of such son without any opportunity being given him of asserting the right which the father had not time to assert.

In the case of *Huro Chunder Chowdhry* v. *Kishen Koomar Chowdhry, W. R. V.* 27, the plaintiff an adopted son sued in Chyte 1270, B. S. for possession of the estates A and B, from which he alleged that he had been dispossessed by the defendant. In respect of the estate A, it being admitted by the plaintiff, that his mother Taramonee had been dispossessed thereof in the year 1264, by a summary award, it was held by the lower Court, and by the High Court on appeal, that as Act XIII of 1848, was in force at the time the award was made, and as the limitation of three years prescribed by that Act was absolute,—no time being allowed to be deducted for any cause whatever in computing the term,—the plaintiff's suit, which was not brought within three years from the date of the award, was barred by limitation, and that the plaintiff could derive no benefit from the fact of his having been a minor during the time when the period of limitation was running. It was observed by the Court that "in suing

to reverse an award of the Revenue authorities, it was necessary under Act XIII of 1848, to sue within three years from the date of the final award, and that as no deduction or allowance was made by that law for legal disability, the agents, of whatever nature they might be, of parties legally disabled from appearing themselves, were under obligation to appear for them within three years to contest such awards, and if they failed to take the necessary steps to that end, the parties for whom they acted must be held to have lost their rights by efflux of time." (Compare *S. D. D.* 1857, p. 1197.) In respect to the estate B, the plaintiff stated that the defendant took possession thereof in 1254, B. S., in conformity with an order passed by the Magistrate, under Act IV of 1840, dispossessing his mother Taramonee; that at the time his mother Taramonee was thus dispossessed, she held as guardian of a former adopted son who died in Chyte 1257; that he—the plaintiff—was adopted in Chyte of 1258, that he attained majority in Magh 1268, and that his suit being brought in Chyte 1270, within three years from the time when he came of age, was in time under the provisions of the Section under notice. It was held by the lower Court, that as it appeared from the plaintiff's own statement that Taramonee was under no legal disability to sue as for her own rights between the time of the death of her first adopted son and the time when the plaintiff was adopted by her, limitation must be taken to have begun to run, at any rate, from the 1st Bysack 1258, and consequently—as no deduction could be allowed in computing the period of limitation on account of subsequent disability—that the plaintiff's suit which was not brought until upwards of thirteen years from the 1st Bysack 1258, was barred by limitation. This ruling of the lower Court was reversed by the High Court, where it was held that as the plaintiff was neither the heir of his adopted brother who died in infancy, nor of his mother, it followed that when the cause of action arose, and previous to his adoption, no one through whom he claimed was in possession of the property of which the lands in dispute

formed a portion; that limitation, therefore, could not run against him until his adoption, at which time he was a minor and that his suit which was brought within three years from the time when his minority ceased must be considered to be within time. It was remarked by the Court in reference to this decision, that they had not overlooked the ruling of the Privy Council in the case of *Kattama Nauchear* v. *The Rajah of Shivagungah* (*W. R. Privy Council Cases. II.* 31,) to the effect that a decree obtained against a widow in possession of her husband's estate would bind her husband's heirs unless that decree could be successfully impeached upon some special ground. It does not, however, appear from the judgment as reported, in what way the effect of the Privy Council ruling was got over.

A suit by an adopted son after Act XIV of 1859, came into operation, to set aside acts of his adopting mother done during his minority to the injury of his estate, if not brought within twelve years from the time when the acts were committed, must be brought within three years from the time when the plaintiff attains majority, and no deduction can be allowed in computing the period of limitation by reason that subsequent to the time when he attained majority, suits in which the validity of his adoption was at issue, were pending. *Muddun Mohun Tewaree.* v. *Kishen Mohun Koondoo W. R. V.* 32. *Muddun Mohun Tewaree* v. *Nund Kishore Doss Mohunt. W. R. V.* 295.

In the case of *Anundo Koonwur* v. *Takoor Panday, W. R. Misc. App. IV.* 21, the Court intimated an opinion that the provisions of this Section, although intended primarily to apply to *suits*, are also referable to applications for execution of decrees. But in the more recent case of *Rotty Rumun Oopadhya* v. *Binode Chunder Oopadhya, W. R. Misc. App. V.* 10, in which the decree-holder urged that his application for execution was in time as it was made within the prescribed period after attaining majority, the Court refused the application, observing:—"We know of no law or rule of practice which stays the Law of Limitation in cases of execution,

pending the period a decree-holder may be under a legal disability. Section 11, Act XIV of 1859, relied on by the decree-holder, applies to *suits* and not to processes in execution of a decree."

The provisions of this Section cannot be used for the purpose of altering the period of limitation prescribed in Act X of 1859, with regard to rents. *Dinonath Panday* v *Roghoonauth Panday. W. R. Act X Cases. V.* 41. The Court in this case observed that "it could scarcely have been the intention of the Legislature that if a person was an infant at the time his rents became due to him, he should be allowed three years after the attainment of his majority for the purpose of suing his ryots for rent due, inasmuch as such a provision would in some cases give him a right to sue for his rents eighteen or twenty years after they became due."

SECTION 12.

What persons to be deemed to be under legal disability.

The following persons shall be deemed to be under legal disability within the meaning of the last preceding Section—married women in cases to be decided by English law, minors, idiots, and lunatics.

WITH reference to the exceptions from the ordinary rules of limitation on the ground of legal disability provided by Sections 11 and 12, the Indian Law Commissioners observe in their Report dated the 21st March 1842 :—"We have thought "it proper to specify the causes for which exception from the "rules of prescription shall be allowed, and not to leave "any discretion to the Courts. We see no reason to provide for "any cases other than those we have specified."* As this in-

* In the original Draft Act prepared by the Indian Law Commissioners, "coverture" was not included as a disability, the Commissioners being of opinion that the identity of interests between husband and wife would in general be sufficient to ensure attention to her pecuniary claims against third parties. See Reports of the Indian Law Commissioners for the years 1843-1841. p. 38

tention, however, has not been expressly declared in the Act, it has sometimes been contended that the enumeration of instances of disability in the Section under notice is not exhaustive, and that there may be other disabilities besides those therein mentioned. See the cases of *Robert & Charriol* v. *Lombard*, *Indian Jurist Rep. N. S. I.* 192; *Muddun Mohun Tewaree* v. *Kishen Mohun Koondoo*, *W. R. V.* 32; and *Muddun Mohun Tewaree* v. *Nund Kishore Doss Mohunt*, *W. R. V.* 295. In the case last cited, the Court declared it to be their opinion that the persons enumerated in Section 12, were the only persons who can ever be said to be under a legal disability within the meaning of Section 11.

It was held by the late Sudder Court, that as there is nothing to prevent a person under sentence of imprisonment for an affray from instituting and prosecuting a suit through law agents, the term of imprisonment ought not to be deducted in computing the period of limitation. *Nujeeba Khatoon* v. *Mirza Nawab Hossein*. *S. D. D.* 1859. p. 1509. This decision, pronounced under the old Law of Limitation, is entirely in accordance with the provisions of Act XIV of 1859.

SECTION 13.

Computation of period of limitation in case of absence of defendant.

In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation unless service of a summons to appear and answer in the suit can, during the absence of such defendant be made in any mode prescribed by law.

IT will be observed that the terms of this Section provide only for the absence of a defendant and not for the absence of a plaintiff. Where a plaintiff as adoptive son of a person who died

in the year 1836, instituted a suit in 1862 in which he claimed a third share in certain property of which the defendant had taken possession in 1838, and contended that his claim was not barred by the law of limitation, inasmuch as from the year 1844, when he was fourteen years old, down to ten months previous to the filing of his plaint, he had lived in Nepaul, Oude and the North-Western Provinces, and the time during which he was absent from the British territories should be excluded in computing the period of limitation; it was held by the Madras High Court, that the plaintiff's voluntary absence in a foreign country after he had attained his majority could not bar the operation of the Act. *Venkatasubha Pattar* v. *Giri Ammal. Madras High Court Rep. II.* 113.

SECTION 14.

Computation of period of limitation in case of suit prosecuted *bonâ fide*, but in wrong Court.

In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal if any has been pending, shall be excluded from such computation.

THE provisions of this Section do not apply to cases in which the right of the claimant has been judicially determined, but to suits which through error have been in good faith instituted in a Court not having jurisdiction, and in which consequently

no judgment has been given. *Kalee Chunder Chowdhry* v. *Ruttun Gopal Bhadooree. W. R. Misc. App. II* 1. To the same effect it was held in the case of *Nundoo Lall Sirkar* v. *Dwarkanath Biswas, W. R. II.* 9, that in computing the period of limitation, a deduction can be claimed under this Section of the time during which a former suit was pending, only in cases in which the Court before which the former suit was brought had no jurisdiction, and where in consequence there has been no adjudication.

Where a plaintiff claims that the time during which a former suit was pending should be deducted in computing limitation, and it appears that the former suit was not brought by the plaintiff, nor by any one through whom he claims, no deduction can be allowed under the provisions of this Section. *Borodakant Roy* v. *Sookmoye Mookerjee. W R. I.* 29.

In computing the periods of limitation no deduction can be made under this Section for the time during which the plaintiff was litigating with another defendant on the same cause of action. *Munna Jhunna Koonwur* v. *Laljee Roy. W. R. I.* 121. The rule under the old law was the same. *Ajoodhya Mitter* v. *Sreenarain Behara. Hay's Rep. I.* 303. In a suit brought against two defendants A and B, the plaintiff claimed that in reckoning the period of limitation, a deduction should be made of the time during which he had been engaged in prosecuting a former suit upon the same cause of action against A alone, which former suit had been nonsuited because B had not been joined as a defendant. The Court held that no deduction could be made upon such grounds. *Kristo Doss Surmokar* v. *Nilmadhub Surmokar and another. W. R. V.* 281.

The terms of the Section provide for a deduction only in cases in which a claimant "shall have been engaged in *prosecuting* a suit upon the same cause of action against the same *defendant.*" It has been held, however, that these words are to be construed *liberally* and not *literally*, and that a deduction should equally be made of the period of pendency of a former suit, in

which the claimant was maintaining against the same party the same claim as *defendant*, which in the subsequent suit he prefers as a *plaintiff*. *Din Dyal Chatterjee* v. *Maharajah Jugutendur Bunwaree*. *W. R. I.* 310.

In excluding from the period of limitation the time during which a former suit was pending, the day on which the proceedings in that suit were commenced, and the day on which they ended, should both be counted. *Hurro Soonduree Dabea* v. *Kally Mohun*. *Marshall's Rep. I.* 138; *W. R. Sp. No. p.* 46.

In computing the period of limitation in a suit for possession by a purchaser at a sale in execution of a decree, the time during which a suit by the judgment-debtor to set aside the sale was pending, must be deducted. *Gopal Chunder Ghose* v. *Raj Chunder Dutt*. *W. R. Misc App. II.* 9.

B having failed to pay the amount due upon a bond which he had executed in favour of A, executed a kistibundee in substitution thereof, upon which A afterwards sued and obtained a decree. During the Mutiny the record of the suit and the decree were burned. Subsequently A brought a fresh suit, which he based upon the original bond in lieu of which the kistibundee had been given. The High Court threw out the suit, but gave A leave to sue for any balance which might still be due upon the former decree and the kistibundee. A sued accordingly. The lower Court finding that there was a former decree for a certain sum due upon the kistibundee, and that there was neither allegation nor proof of payment by B, gave a decree for the said sum with interest. On appeal, it was urged that A's suit was not in time, but the Court held that inasmuch as the suit thrown out by the High Court, although not in form the same as that subsequently brought, was the same in substance, the cause of action in both being the debt due to A, whether due on the original bond or on the substituted kistibundee, and inasmuch as the Court was unable in the former suit, owing to the erroneous form in which it was brought, to adjudicate on the claim, the plaintiff was entitled

under the provisions of the Section under notice, in reckoning the period of limitation, to deduct the time during which the former suit was pending. *Golab Koonwur* v. *Shah Keramut Hossein. W. R. III.* 101.

A holding a decree of a Court of Small Causes against B, caused a boat, the property of C, to be attached as B's property. A petition filed by C, under Section 246, Act VIII of 1859, in which he claimed the boat as his, was rejected by the Small Cause Court Judge on the 22nd January 1864, and the boat was accordingly sold in execution of A's decree and was purchased by D. On the 30th July following, C instituted a suit in the Moonsiff's Court against A, B and D, to establish his right of ownership in the boat, which suit was dismissed by the Moonsiff on the 29th September 1864, on the ground that he had no jurisdiction. Against this decision C, on the 13th November 1864, appealed to the Zillah Judge, who upon the 29th March 1865, confirmed the decision of the Moonsiff. C thereupon instituted a fresh suit against the same defendants in the Small Cause Court. The defendants pleaded that the claim was barred under Section 246, Act VIII of 1859, as not brought within one year from the date of the order of sale. The plaintiff on the other hand contended that in accordance with the provisions of the Section under notice, the time during which the previous suit and the appeal therefrom were pending should be deducted in reckoning the period of limitation. The Judge of the Small Cause Court being of opinion that when the Moonsiff decided that he had no jurisdiction to try the plaintiff's claim, it was the clear duty of the plaintiff at once to have brought his suit in a Court having jurisdiction, and not to have appealed from the Moonsiff's decision, held that only the time during which the plaintiff's suit was pending in the Moonsiff's Court, and not the time during which the appeal was pending, should be deducted in reckoning limitation, and that as the deduction of the time during which the suit was before the Monsiff did not bring the case within the prescribed

period of one year, the suit was barred. But on a reference to the High Court it was decided, that the time during which the plaintiff had been prosecuting his appeal *bonâ fide* and with due diligence, as well as that during which he had been engaged in prosecuting his case in the Court of first instance must be deducted in computing the period of limitation. The Court observed:—"The plaintiff was prosecuting his suit within the meaning of Section 14, Act XIV of 1859, while he was prosecuting his appeal. The Moonsiff held that he had no jurisdiction, and the appellate Court, affirming that decision, held that it had no jurisdiction. The words in Section 14, 'or shall have passed a decision which on appeal shall have been annulled for any cause, &c.' apply to cases in which a plaintiff has prosecuted his suit with effect, and in which, upon appeal prosecuted by the defendant his adversary, the decision either of the Court of first instance or of the first Court of appeal, has been annulled. It is not certain that a plaintiff, *bonâ fide* resisting an appeal filed on the ground of want of jurisdiction would not be *prosecuting* his suit *bonâ fide*. The words were probably inserted to prevent any misconception on that point." *Shumboonath Biswas* v *Kistodhone Sircar and others. W. R. S. C. Ct. Cases. V.* 8.

Property belonging to C was sold in execution of a decree and was purchased by A. Subsequently, B having also obtained a decree against C, proceeded to attach the same property in execution. A objected, but the Principal Sudder Ameen overruled his objections, and on the 10th May 1861, directed attachment to issue. A thereupon appealed to the Zillah Judge who reversed the order of the Principal Sudder Ameen. The order of the Zillah Judge was in turn reversed by the High Court upon the 10th April 1863, it being held that the Principal Sudder Ameen's order for the attachment of the property was passed under the provisions of Section 246, Act VIII of 1859, which admit of no appeal, a claimant's only remedy under that Section being the institution of a regular suit. C accordingly instituted

a regular suit, which was dismissed by the Court of first instance as not brought within one year from the date of the order for attachment. On appeal it was held by the Zillah Judge that the word *suit* in Section 14, Act XIV of 1859, was not to be limited to a regular suit, but comprehended litigation of any kind between the parties, and that deducting the time during which the former ineffectual litigation had been pending, the plaintiff's suit was in time. This ruling was, however, reversed by the High Court where it was held that as the terms of Section 246 of Act VIII of 1859, prohibit procedure by appeal, and direct procedure by regular suit, the plaintiff, who notwithstanding the express language of the law had elected to proceed by appeal, could not be considered, within the meaning of Section 14 of the Limitation Act, to be prosecuting a suit *bonâ fide* and with due diligence so as to be entitled in bringing his second suit to deduct the period of the former litigation. *Watson & Co* v. *Ramdoss Baboo*, reported in the "Englishman" of the 8th August, 1864.

In the case of *Muddun Mohun Tewaree* v. *Kishen Mohun Koondoo*, *W. R. V.* 32, the plaintiff, an adopted son, sued to set aside certain acts of his adopting mother in alienation of the estates of his adopting father. The defendants in possession of the estates pleaded limitation by reason that the plaintiff's suit was not brought within twelve years from the date of the acts which he sought to set aside, nor within three years from the time when he attained majority. In reply, the plaintiff contended that in computing the period of limitation a deduction should be made of the time during which he was engaged in prosecuting as against his adopting mother, and against those who on failure of his right would have been heirs of his adopting father, successive suits to establish the legality of his adoption. The lower Court decided that as the plaintiff was in no position to sue until his right to the succession had been determined, the time during which the former litigation had been pending should be deducted. But this decision was reversed by the High

Court on appeal. The Court observed that the deduction contemplated in Section 14 Act XIV of 1859, is of the pendency of suits of an entirely different character as therein specified; and that the circumstance of the plaintiff's right of succession being under litigation, in no way interfered with his right of suit to set aside alienations, since when he sued his mother to establish the legality of his adoption, he might at the same time have sued to have her acts set aside. See also the case of *Muddun Mohun Tewaree* v. *Nund Kishore Doss Mohunt. W.R. V.* 295.

A sued to recover money due by B upon an instalment bond. B pleaded that several of the instalments were barred by limitation. It was, however, held by the lower Court and by the High Court on appeal, that in calculating the period of limitation, the time during which a suit brought by B against A for the cancelment of the bond had been pending should be deducted. *Shamloll Gundee* v. *Choonoo Koomaree Thakooranee. Hay's Rep. I.* 444.* This case was decided under Section 14, Regulation III of 1793, which provided an exemption from the ordinary rule of limitation in all cases in which the plaintiff could show that he had been precluded by some good and sufficient cause from obtaining redress, it being the opinion of the Court that the pendency of B's suit for the cancelment of the bond was a sufficient reason for A not proceeding with his claim. As no general exemption such as that provided by the Regulation referred to, is to be found in Act XIV of 1859, it seems doubtful whether if the above case had to be decided under that Act, any deduction could be allowed on account of the previous litigation, since although in that litigation the same parties were proceeding against one another upon a cause of action substantially the same, it would appear that the claim was prosecuted in a competent Court, and was there adjudicated. In the case of *Issureenund Dutt Jha* v. *Parbutty*

* Compare the cases of *Rajah Enayet Hossein* v. *Sayud Ahmed Reza*, Moore's I. A. C. VII. 238, and *Prannath Roy Chowdhry* v. *Rookea Begum*, Moore' I. A. C VII 323, decided under Section 14, Regulation III of 1793.

Churn Jha, *W R. III.* 13, it was held by the High Court, that a plaintiff suing for the recovery of mesne profits was not entitled in computing the period within which his suit should be instituted to deduct the time during which he had been suing the same defendant for possession of the property in respect of which the claim for mesne profits was afterwards brought. Compare the cases cited *ante* pp. 124-126. But the ruling in these cases would seem to have been departed from in the case of *Joykurun Lall* v. *Ranee Asmudh, Kooer*, *W. R. V.* 125, in which it was held by PEACOCK C. J. and L. S. JACKSON J. that in the case of a party who has been put out of possession under the judgment of a Court of competent jurisdiction, and afterwards restored to possession under a decree of the Privy Council, the right of action for mesne profits does not accrue until the judgment of the Privy Council setting aside the decree of the lower Court has been pronounced.

Under Section 14, Regulation III of 1793, the pendency of a suit in a Court without jurisdiction was no ground for any deduction in reckoning the period of limitation in a subsequent suit between the same parties, *Okhetoonissa* v. *Koochil Sirdar*. *W. R. II.* 45 ; and the same remark applies to the provisions of Act XIII of 1848. *Sham Kant Bannerjee* v. *Gopal Lal Tagore*. *W. R. I.* 328 ; *Gopeenath* v. *Duriao Tewaree S. D. D.* 1857, *p.* 688 ; *Mohendronarain Singh* v. *Jeymungul Singh*. *S. D. D.* 1857, *p.* 787.

In the case of *Gossain Doss Dey* v. *Khetternath Dey*, *W. R. Misc. App. IV.* 18, the petitioner sought to execute a decree passed by the Zillah Judge, on the 27th March 1860, and confirmed on appeal by the High Court in 1862. Instead of filing his application for execution in the Judge's Court, he applied to the Principal Sudder Ameen on the 24th November 1864, by whom, on the 17th February 1865, the application was struck off the file, as not within his jurisdiction. On the 20th May of the same year, application for execution was made to

the Zillah Judge, who considering the decrec-holder to be exempted from the effect of limitation by the provisions of the Section under notice, held that the application for execution had been made in time, and allowed execution to issue. But on appeal to the High Court it was held that this was an erroneous view of the law. The Court observed,—"Sections 1 to 18 of the Act, relate distinctly to the time within which *suits* are to be instituted, and Section 14 provides that where a party has in good faith and with due diligence, been engaged in prosecuting a *suit* in a Court not having jurisdiction, the time during which the suit was pending in such Court shall not be counted against him. But this Section does not apply to *cases of execution*. With the decree, the right of the decree-holder is established, and he has only to carry out his decree under the 19th and following Sections of the law, as one or other of them may be applicable to the case; and we do not think that a party can be said to be acting in good faith, when he applies for the execution of a decree to a wrong Court, for it is a fundamental rule, that unless otherwise ordered by competent authority, execution of a decree must be taken out in the Court which passed the decree."

In computing the periods of limitation specially provided in Act X of 1859, no deduction can be made of the time during which a plaintiff has been prosecuting his claim in another Court, by applying the provisions of Section 14, Act XIV of 1859, since Act X of 1859, is a Code complete in itself, and where it prescribes a certain period of limitation, that period cannot be modified or altered by reference to the provisions of any other Law. *Modhoosoodun Paul Chowdhry* v. *Poulson. W. R Act X Cases. 11.* 21.*

* The judgment of the Full Bench in the case of *Modhoosoodun Paul Chowdhry*, has been followed in the following reported cases, *Ram Sunkur Sanapnutty* v *Gopal Kissen Deo, W. R. I.* 67; *Borodakant Roy* v. *Nobokant Dey*, ibid. p. 100; *Soodh Bewah* v. *Nuthoo Nushyo*, ibid. p 131, *Romesh Chunder Dutt* v *Dakhina Dabea*, ibid. p. 142; *Stephen* v. *Gasper*, ibid p 265; *Ranee Asmudh Koonwur* v. *Joykurun Lall*, ibid p 349; *Bibee Sowlutoonissa* v. *Mayer, W. R Act X Cases II* 96; *Modhoosoodun Mojoomdar* v. *Brojonath Koond Choudhry, W R Act X Cases* V 44

Section 15.

Person dispossessed of immoveable property otherwise than by due course of law, may recover possession notwithstanding any title that may be set up.

If any person shall without his consent have been dispossessed of any immoveable property otherwise than by due course of law, such person or any person claiming through him shall in a suit brought to recover possession of such property be entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this Section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act.

Suit for dispossession to be brought within six months.

Suit to establish title not to be affected.

This Section does not confer on the person who unlawfully acquires the possession of land, the advantage of a short period of limitation within which the party dispossessed is bound to show an absolute title to recover. It gives to the person who has been wrongfully deprived of possession a right to recover possession within six months, without regard to any title, however clear, which may be set up against him. If he sues after six months have expired, the parties to the suit are left in the same condition as they would have been in, under the former law with reference to the production of proof. *Protab Chunder Burooah* v. *Ranee Kantaeswaree Dabea. W. R. II.* 249. See to the same effect the decision of the Madras High Court in the case of *Kunhi Komapen Kurupu* v. *Changarachan Kandil Chembata Ambu, Madras High Court*

Rep. II. 313, in which it was held that this Section does not abridge any rights possessed by a plaintiff, but is intended to give him the right if dispossessed otherwise than by due course of law, to have his possession restored without reference to the title on which he holds, or to that which the dispossessor asserts. The Court observed that "Section 15 in no way controls Clause 12 of Section 1, inasmuch as it does not prescribe a period of limitation for suits, but, without forcing the person dispossessed to a suit, really provides a remedy other than a suit, and secures to him the position of a defendant in a suit to be brought at the option of his adversary, who, for aught that appears, may be the person entitled. It however limits the period within which the extraordinary remedy must be applied for." It was further observed by the Court that "the plain object of the Section is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the party who has taken the law into his own hands from deriving any benefit thereby, and to obviate the effect of the possible application to such cases of the English Law as laid down in *Harvey* v *Bridges*, 14 Mees. & Wel. 442, to the effect that a freeholder, if entitled to eject the person in possession, may commit an indictable offence in doing so, and yet gain all the advantages of a legal possession, and be secure against the action of the party evicted."

Where the plaintiff having been forcibly dispossessed from a house and premises by the defendant, brought an action of ejectment within six months from the time of the alleged dispossession, it was held by the Madras High Court, that this Section applied, and that the plaintiff was entitled to recover possession notwithstanding any title that might be set up by the defendant. *Kullamal* v. *Kuppu Pillai. Madras High Court Rep. I.* 85.

Where a Court on an application for execution of a decree for possession, and in the exercise of its judicial discretion, issues a warrant to the sheriff, directing him to seize and deliver

to the decree-holder certain specific lands, not properly coming within the description in the decree, and not, in fact, forming part of the lands for possession of which the decree was given, and the sheriff seizes and delivers in strict accordance with directions of the writ, it has been held that the dispossession thus effected, is a dispossession by due course of law within the meaning of the Section under notice. *Jadub Chunder Chenchy* v. *Heeraloll Shaha. Indian Jurist Rep N. S. 1* 21.

In respect of claims to possession under Act XVI of 1838 of the Bombay Code, and under Act IV of 1840 of the Bengal Code, by parties wrongfully dispossessed, see *ante* pp. 45-46.

SECTION 16.

Act not to interfere with equitable jurisdiction of Supreme Courts.

Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of any Court established by Royal Charter in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

IN the Revised Draft Act submitted to the Legislature by the Indian Law Commissioners with their Report dated the 1st October 1842, this Section stood as follows. "Provided that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of *any* Court in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act." With reference to this Section the Commissioners observed in their Report:—"We have introduced a provision corresponding with Section 27 of the Statute "3 and 4, W. IV. c. 27, to preserve any rule or jurisdiction of "any Court by which equitable relief may be refused on the "ground of acquiescence, or otherwise, in the party seeking it. "This provision seems to be necessary with respect to Her Maj-

"esty's Courts; while it may be applicable also in cases falling "under the jurisdiction of the Company's Courts. For example "in the case of a person suing in one of the Company's Courts "to recover land of which, through fraud or mistake, he had "been led to make a conveyance to another, praying that the "conveyance may be considered void on the ground of such "fraud or error, if it should appear that he had been for some "time aware of the alleged fraud or error, and that he had, not-"withstanding, by his conduct acquiesced in the adverse pos-"session, as by encouraging the possessor to build upon the land, "or otherwise to lay out money in improving it, we conceive that "the Court would think itself justified in refusing the remedy "and relief sought by him, although not barred by prescription, "on the ground that he had by overt acts given an after-con-"firmation to the deed which his plaint impugned." Compare the case of *Sahebpersad Singh* v. *Ram Bahadoor Singh*, cited *ante*, p. 173.

As the Section was finally enacted, it formerly had reference only to suits in the late Supreme Courts, and is now applicable only to suits brought before High Courts in the exercise of their ordinary original civil jurisdiction. In the case of *Rama Rau* v. *Rajah Rau*, cited *ante* p. 174, it was observed by the Madras High Court, that "the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil, for which a period of limitation is provided by the Limitation Act; and that lapse of time as a defence to such suits can only be relied upon, when under the Act it has become a bar. Compare the case of *Nilatatchi* v. *Venkatachala Mudali*, *Madras High Court Rep. I.* 131, in which it was held that there is no such doctrine in this country as that acquiescence is a binding presumption of law after the lapse of several years. See also the case of *Peddamuthulaty* v. *N. Timma Reddy* cited *ante*, p. 174.

It may, however, be safely asserted that evidence of such direct acquiescence as that instanced in the illustration of the

Indian Law Commissioners above cited, although it could not be taken to be a legal bar in a suit instituted in a Court not established by Royal Charter, so as to render the trial of the suit unnecessary, would afford the strongest evidence against the genuine character of the plaintiff's claim.

SECTION 17.

This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.

Act not to extend to public property, nor to suits for the recovery of public claims.

IN the case of the *Collector of Rungpore* v. *Prossonno Coomar Tagore*, *W. R. V.* 115, the Government, considering itself entitled to the fisheries—*julkur*—of large navigable rivers, had, in the year 1860, taken possession summarily by its Revenue Officers of the fisheries of the defendant in the Bhurumpootra, Konai and other rivers. The defendant had thereupon, on the 6th July 1860, sued for recovery of possession, and had obtained a decision in his favour. The Government then brought a regular suit to establish its right and title to the fisheries in dispute, which suit was dismissed by the Court of first instance as barred by limitation, inasmuch as the Government had not been in possession within sixty years before suit. Against this decision the Government appealed, urging that the suit was not barred by limitation, since the cause of action only arose at the time when the defendant after being summarily ejected, instituted his suit for possession; and inasmuch as the defendant had failed to establish that the fisheries in question formed any part of his estate at the time of the permanent settlement. In disposing of this appeal, the High Court held that the claim of the appellant was barred by limitation under Section 2, Regulation II of 1805. "That law" it

was observed, "gives the Government as the representative of the Sovereign, a period of sixty years within which to sue for rights to public revenue such as these now claimed. The law gives no extension of that period of sixty years. It allows no exception so as to fix the period from which limitation shall be held to run, at the time when the attention of Government may first be called to its rights. Neither that law, nor any other law provides remedies for the Government, or for others who sleep over, or do not give attention to their own rights in due time, nor does it fix limitation from the date of suit by a party considering himself illegally ejected by Government from long previous possession. It is admitted that the Government is not in a position to prove its own possession before the time when it summarily ejected the defendant, but it is pressed upon us that it is for the defendant to prove that he has been in adverse possession for sixty years, before he can succeed in his plea that the plaintiff is barred by limitation. We do not concur in this view. When a defendant pleads in bar that the plaintiff cannot under the Law of Limitation, be heard in a cause because he has not been in possession within the period prescribed by law, it is for the plaintiff to remove that bar by showing possession within such period as the law prescribes. The Government in this case does not show, or attempt to show its possession in this way. Were we to admit the plea that the cause of action arose only on the 6th July 1860, when the defendants, after their summary ejectment, first sued the Government, it would be equivalent to holding that the plea of limitation might always be successfully urged by a party committing an act of illegal ejectment, and then pleading that it is only when the party illegally ejected sues for his remedy for the loss of his long previous possession that the cause of action arises, and that all previous adverse possession of the defendant ought to go for nothing. This we are not at all prepared to hold."

In the case of *The Government* v. *Bromanund Gossain and others*, *W. R. V.* 136, the Government in the year 1861,

sued certain ghatwals for the possession of lands of which it was alleged that they had taken fraudulent and dishonest possession. The defendants pleaded limitation under the provisions of Regulation II of 1805. It appeared on the trial of the suit that in the year 1847, the disputed lands had been assigned to the defendants under an award passed by the Magistrate under Act IV of 1840, in which award it was declared that the defendants had then been in possession for more than thirty years. Looking at this long possession, the Court of first instance gave judgment for the defendants. But the lower appellate Court considering it to be established that, in respect of title, the greater part of the lands properly belonged to the Government, held that as the defendants had not proved their possession for sixty years, the plaintiff's suit must be decreed. On appeal to the High Court it was ruled, that the *onus* had been wrongly imposed by the lower appellate Court; that considering the very long possession of the defendants, it was not enough that they had failed to prove their possession for upwards of sixty years, but that to entitle the Government to a decree it was necessary for it to show that it had been in possession, either directly, or through subordinate ghatwals, within sixty years prior to the institution of the suit. The case was accordingly remanded for a distinct finding as to whether or not the Government had been in possession within sixty years before action brought.

The view adopted in the decisions above cited as to the *onus* of proof in cases in which a plea of limitation is advanced by a defendant in possession against a claim of the Government seeking to dispossess him, is in accordance with the ruling of the Privy Council in the case of *Nitrasur Singh*, followed in the cases referred to in the remarks upon Clause 12, Section 1, *ante*, pp. 67-68. Cases might however be cited in which it has been held that a plea of limitation must be established by the party advancing it, and that the burthen of proof rests wholly with him. Compare the cases of *Sheonarain Ghose* v

Ranee Joymunnee, S. D. D. 1847, p. 378, and of *Drobomoye Burmonea*, cited *ante*, p. 89.

The extended period of sixty years given to the Government under the old laws of limitation for the prosecution of its claims, had reference only to the hearing, trying, and determining of these claims, and not to the enforcement of rights already determined. In respect of proceedings in execution of decrees, the same rules applied to the Government as to private individuals. The Section under notice may, likewise, be taken to refer only to *suits* by the Government, and not to proceedings in execution, which in all cases, it is conceived, should be regulated by the provisions of Sections 19 to 23 of Act XIV of 1859, without any exception in favour of Government.

As this Section preserves the operation of the old Laws of Limitation in respect of public claims by the Government, the old decisions in reference to such claims may be accepted as precedents. See *Macpherson's Civil Procedure.* 4th ed. p. 93.

SECTION 18.

Act not to apply to suits now pending or to suits instituted within two years.

Suits afterwards instituted to be governed by this Act.

All suits that may be now pending or that shall be instituted within the period of two years from the date of the passing of this Act shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period shall be governed by this Act and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding.

THE operation of Act XIV of 1859, was modified by Acts XI and XXXII of 1861, and by Act XIV of 1862.* Act XI

* These Acts will be found printed in the Appendix.

of 1861, extended the time within which suits might be brought without being affected by the provisions of Act XIV of 1859, until the first day of January 1862. All suits instituted since that date are clearly to be governed by the provisions of Act XIV of 1859. *Mohidin Sahib* v. *Khader Sahib. Madras High Court Rep. II.* 42. From the first day of January 1862, Act XIV of 1859, had as full operation as if Act XI of 1861, had never been passed. *Mofussil S. C. Ct. References.* p. 158. Acts XXXII of 1861, and XIV of 1862, postponed the operation of that part of Clause 8, Section 1 of Act XIV of 1859, which relates to suits for the price of articles sold by retail, to the first July 1862, and to the first January 1865, respectively. See the case of *Buldeo Doss Joharry* v. *Sreenauth Sein*, cited *ante*, p. 49.

SECTION 19.

Proceedings for enforcing judgments, &c., of Supreme Courts to be taken within twelve years.

No proceeding shall be taken to enforce any judgment, decree, or order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived or some part of the principal money secured by such judgment, decree, or order, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order, but within twelve years after such revivor, payment, or acknowledgment,

or the latest of such revivors, payments, or acknowledgements as the case may be : provided that for three years next after the passing of this Act, every judgment, decree, and order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

Proviso as to judgments now in force.

In the case of *A. Wise* v. *Jugobundoo Baboo*, *W. R. Misc. App. IV.* 10, an application was made on the 6th January 1863, for execution of a decree of the Privy Council passed on the 29th July 1859. The application was refused by the Court in which it was made, as not made in accordance with the provisions of Section 20, Act XIV of 1859, within three years from the date of the decree. On appeal, it was urged by the decree-holder that as the Privy Council is a Court established by Royal Charter, execution of its decrees is governed by the provisions of Section 19, and not by those of Section 20 of Act XIV of 1859. But it was held by Loch and Glover JJ. that Section 19 of Act XIV, is applicable only to the Courts *in this country* established by Royal Charter, and that the decrees of the Privy Council in appeals preferred from judgments passed by the late Sudder Court, were and are executed, under Section 1, Act XXV of 1852, by the Court which originally tried the case ; that as decrees of such Court they are subject to all the rules of such Court ; and, consequently, that the application of the decree-holder had been properly held to fall under the provisions of Section 20 of the Limitation Act.

But the authority of this decision has been destroyed by the recent ruling of the Full Bench, in the case of *Anundo Moyee Dassee* v. *Poorno Chunder Roy*,—not as yet reported,—in which it was held that the Legislature of this country has no power to limit the time for executing the decrees of the Privy Council; that the words of Section 1, Act XXV of 1852, have

reference merely to procedure and not to limitation; and that neither Section 19, nor Section 20 of Act XIV of 1859, have any application to the execution of Privy Council decrees.

In the case of *Jussorut Khan* v. *Kanyeloll Dey and another*, reported in the "Indian Daily News" of the 13th August 1866, it was held by PHEAR, J. that the Small Cause Courts of the Presidency towns,—constituted under Act IX of 1850, in which, it is declared that "the several Courts of Commissioners and of Requests now holden under the authority of the Charter of Justice of King George the Second, shall be holden according to the provisions of this Act,"—are not, within the meaning of this Section, Courts established by Royal Charter.

In the case of *Coultrup* v. *Smith*, *Madras High Court Rep. I.* 204, it was held that the judgments of the Judges of the late Supreme Courts, sitting, under the provisions of Act IX of 1850, as Judges of Small Cause Courts, are judgments of a Court established by Royal Charter, and that the execution of such judgments falls to be regulated by the terms of the Section under notice. The Court observed that under the provisions of Sections 11 and 12 of Act IX of 1850, the Supreme Court Judges were enabled to exercise the powers conferred by the Act upon the Judges of Small Cause Courts, but that in doing so, they exercised such powers as Judges of the Supreme Court. The correctness of this view may, however, be thought open to doubt, since it may be said that as the Judges of the Supreme Courts sitting as Judges of Courts of Small Causes can exercise no powers other than those given by the Act to Small Cause Court Judges, the execution of the judgments of both classes of Judges would seem to be properly governed by the same rules. If therefore the judgments of ordinary Judges of Small Cause Courts must be executed under the provisions of Section 20 of the Limitation Act, it is conceived that the same provisions would apply to the judgments of Supreme Court Judges sitting as Small Cause Court Judges.

In the case of *Lallah Nundocoomar* v. *Ramdoss*, *Indian*

Jurist Rep. N. S. I. 152, the question was raised, but not decided, whether a Court established by Royal Charter can execute a decree of a Court not established by Royal Charter, where no proceeding has been taken within three years in the original Court to keep the decree in force.

SECTION 20.

Times for enforcing execution of judgment, &c., of a Civil Court not established by Royal Charter.

No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution.

ACCORDING to the practice prevailing in Bengal before Act XIV of 1859, came into operation, a decree not carried into execution within one year from the time of its being passed, might be executed on application being made for that purpose within twelve years from the date of its passing, after the opposite party had been personally called upon to show cause why it should not be carried into effect. The date of passing the decree was held to mean the date of the decree in the Court of first instance, in cases in which there had been no appeal, and the date of the decree in the Court of ultimate appeal, in cases in which there had been an appeal. An application made beyond the period of twelve years could not be entertained unless the applicant could satisfy the Court that there had been good and sufficient cause for the delay, as, for example, if he could prove that he demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or could show that he had directly preferred his claim to the matter in dispute to a Court of competent jurisdiction to try the demand, and could

assign satisfactory reasons to the Court why he did not proceed in the suit; or unless he could prove that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress. See *Macpherson's Civil Procedure* 4th ed. pp 318, 319, and the authorities there cited. These rules as to limitation in reference to the execution of decrees, appear to have been laid down by analogy to the twelve years rule of limitation in respect of suits, and although they did not, as is observed by Mr. Macpherson, form part of the law enacted by legislative authority, yet they were sanctioned by the long and uniform practice of the tribunals.

The period of twelve years formerly allowed to a decree-holder within which to execute his decree, is reduced under the provisions of the Section under notice, to a period of three years in respect of all decrees not being decrees of Courts established by Royal Charter.

It has been held that under Act XIV of 1859,—as under the old rules,—the period of three years is to be reckoned in cases in which there has been an appeal, from the date of the final judgment, decree, or order of the appellate Court. To this effect see the case of *Sheikh Fuzl Imam* v. *Doolun Singh*, *W. R. Misc. App. V.* 6, in which the facts were as follows:—In the year 1860, the late Sudder Court had affirmed the decision of a lower Court in part, but had remanded the case for further investigation on certain points. The investigation was made, and a decree was passed by the lower Court which was upheld by the High Court in the year 1862. The decree-holder having applied, in 1865, for execution of his decree, the application was refused as not made within three years from the date of the original decree. But it was held, on appeal, by the High Court that this decision was erroneous, and that limitation must be taken to run from the date of the last judgment by which the whole decree became final. It was observed that the plaintiff could not be expected to execute, and in fact could not execute an incomplete decree, and could take no steps

to obtain execution, until the whole of the questions in dispute were adjudicated upon.

A plaintiff, having obtained a decree in his favour for less than his demand, appealed to the Zillah Judge by whom his entire claim was disallowed on the ground of limitation. On special appeal to the late Sudder Court the case was remanded for trial on the merits, and on remand was dismissed by the Zillah Judge, whose order was confirmed on a second special appeal to the Sudder Court. A subsequent application to that Court for review of judgment was rejected. The defendant having applied for execution for the costs which had been awarded him in these several appeals, it was held by the Zillah Judge that in respect of the first four decrees, the application was barred, as made more than three years from the date of these decrees. But it was held by the High Court on appeal, that the application was in time. It was observed :—"The defendant had every reason to delay taking out execution for his original costs. By the machinations of the plaintiff, the case was kept continually before the Courts; and until a final decision was arrived at, the defendant had no means of knowing whether, after all, the costs might not be payable *by* him instead of *to* him. In all analogous cases the 'judgment' is understood to mean the 'final judgment,' and we think that it should be so construed in this case, and that the period of limitation should be reckoned from the time when the matter in dispute was finally settled, and the defendant became rightfully and definitively entitled to costs." —*Singh* v. *Lalla Kalee Churn. W. R. Misc. App. III.* 21. This decision was followed in the case of *Huree Bungsho Bannerjee* v. *Ramessur Bannerjee, W. R. Misc. App. VI.* 38. In this case a decree-holder, on the 1st May 1865, applied for execution of a decree obtained by him on the 20th August 1861, which decree having been appealed against, had been confirmed by the late Sudder Court on the 5th May 1862. The Court in which the application was made, refused it, on the ground that execution was barred by the terms of

the Section under notice, inasmuch as more than three years had elapsed since the date of the original decree. On appeal to the High Court it was contended that the three years should be reckoned, not from the date of the original decree, but from the date of the order of the Sudder Court dismissing the appeal, since although a decree-holder is bound to execute within three years a decree which is not under appeal and is final, he ought not to be compelled to execute a decree which has been appealed from, and which may possibly be reversed, until the appeal is decided. The Court held that the three years were to be calculated from the date on which the decree became final, and the relative positions of the parties as decree-holders and judgment-debtors were definitively settled.

The views expressed by the Court in the case of *Bissambhur Panjah* v. *Chowdhry Junmenjoy Mullick*, *W. R. Misc. App. V* 45, may be thought to be not entirely consistent with the decisions in the cases above cited. In this case B having obtained a decree against C, the latter filed an application for review, which application was rejected by the Court in which the decree had been passed. Subsequently, more than three years from the date of the decree, but within three years from the rejection of the application for review, B applied for execution of his decree against the property of C. It was held by the Court of first instance, and by the lower appellate Court that the application was in time, but on appeal to the High Court this ruling was reversed. The Court observed:—"It is argued that the words 'proceeding to keep the decree in force' used in Section 20, Act XIV of 1859, must include the opposing of the judgment-debtor, not only in appeal, but also by voluntarily, or otherwise, appearing to watch an application for review, and that therefore the final orders in such summary proceeding give a new start. We are not prepared to hold that the words "proceedings to enforce execution, or to keep a decree in force," were meant to include the appearance

of a decree-holder to watch or oppose his adversary on appeal, and much less, as here, on an application for a review only. The rejection of an application for review is no decree or final adjudication of a suit."

Under the former practice, as has already been noticed, the period of limitation in cases of execution was extended for any reason which seemed good and sufficient to the Court in which the application for execution was made. By the terms of the present Section the only circumstance which is recognized as a ground for extending the period of limitation in such cases, is the fact of some proceeding having been taken to enforce, or keep in force the judgment, decree, or order which it is sought to execute, within three years next preceding the application for execution A question has however arisen, which may be thought as yet not to have been finally determined, whether the terms of this Section may not be modified by applying to them the provisions of those previous Sections of the Act which allow of an extension of time in certain cases. In the cases of *Saroda Pershad Roy* v. *Digumburee Dabea, W. R. Misc. App III.* 27, *Shudasheo Singh* v. *Luchmee Narain, W. R. Misc. App. V.* 12, and *Kashee Kant Bhuttacharjee* v. *Prossonno Coomar Roy Chowdhry, W. R. Misc. App. V* 31, cited *ante*, pp. 149-151, it was held that a written admission of his debt by the judgment-debtor after the time when proceedings for taking out execution were barred by limitation, was to be considered a condonement of the laches of the decree-holder, and as affording a fresh starting point, from which the period of limitation within which execution should be taken out, should be computed. By the decisions in these cases the provisions of Section 4, would seem to have been recognized as modifying the provisions of Sections 20 and 21.

In the case of *Meer Mahomed Mozuffur Hossein Chowdhry and others* v. *Moulvee Abdool Ali, W. R V.* 173, a suit had been instituted in behalf of the plaintiffs, then minors, by a relative professing to act as their guardian, who, subsequently,

in fraud of the minors, sold their decree to a third party who was merely a *benamee* for the defendant in that suit. No execution was taken out on the decree. The minors when they came of age sued to have the sale of their decree declared fraudulent and void, and to have their names substituted on the record for that of the *benamee* purchaser, and prayed that they might be allowed to take out execution of the said decree. In disposing of this claim the Court observed :—" It is said that the suit is barred by limitation. Possibly, if the plaintiffs were to apply for the execution of the old decree, some objection might be raised under Section 20 of Act XIV of 1859, on the ground that more than three years have elapsed since any proceeding &c., has been taken on that decree. But considering the fraudulent nature of the whole of this transaction, and reading Section 20 along with Sections 9, 10, 11 and 12 of Act XIV of 1859, we have no doubt that execution might properly issue even although more than three years have elapsed."

The cases of *Annund Koonwur* v. *Thakoor Panday, W. R. Misc. App. IV.* 21, and *Rotty Rumun Oopadhya* v. *Binode Chunder Oopadhyá, W. R. Misc. App. V.* 10, in which contradictory opinions were expressed as to whether the period of minority should, under the provisions of Section 11 of the Limitation Act, be deducted in computing the time within which application for execution should be made, have already been noticed, *ante*, pp. 182, 183. The point was negatively decided, in the case of *Rance Shurut Soonduree Dabea* v. *Chunder Coomar Roy, W. R. Misc. App. VI.* 37, the Court being of opinion that the word "limitation" as used in Act XIV of 1859, is used with reference only to the periods within which *suits* can be instituted, and not with reference to the periods within which execution can be had; and that the period prescribed by the Act with regard to the execution of decrees is absolute, and not a limitation subject to exception and extension on account of minority, or other legal disability.

In the case of *Gossain Doss Dey* v. *Khetternath Dey*, cited *ante*, p. 192, it was held that Section 14, Act XIV of 1859, applies only to suits and does not apply to cases of execution.

Much uncertainty has prevailed as to what should, and what should not be considered 'proceedings' within the meaning of this Section. The following cases will illustrate some of the questions which have arisen on this point.

On references to the Full Bench by LOCH and MACPHERSON J J., in the case of *Gooroo Doss Akhoobee* v. *Modhoo Koondoo*, and by L. S. JACKSON and GLOVER J J., in the case of *Degun Singh* v. *Ramshay Singh*, it was held that any *bonâ fide* application made to a Court by a decree-holder with the view of obtaining execution of a decree of such Court, and any substantial act done in furtherance of such application, either by the decree-holder himself, or by the Court put in motion by him, is a proceeding within the meaning of the Section under notice; the words *bonâ fide* being understood to indicate a real desire and intention on the part of the decree-holder to obtain execution of his decree.

In the case of *Rajkissen* v. *Shureefoonissa*, *W. R. Misc. App. IV.* 24, the holder of a decree passed in the year 1858, having applied for execution in 1864, the judgment-debtor pleaded limitation. It appeared from the evidence that the decree-holder had sought to execute his decree in 1859, and had attached property to which a claim was raised by a third party, on whose application the property was released. The decree-holder had thereupon brought an action to set aside the order of release, and to render the property liable to sale in satisfaction of his decree, and was successful. He then sought to execute his original decree by the sale of the property which had been the subject of litigation. It was held by the High Court on appeal, that as that litigation had been undertaken in furtherance of the original decree, the decree was fully kept alive thereby, and that, consequently, the decree-holder was not barred by limitation. It was observed that "although the words of the

law speak of a 'proceeding,' and the second suit was not a proceeding within the exact meaning of the word as used in Sections 20 and 21 of Act XIV of 1859, yet as the subsequent litigation was necessary to enable the decree-holder to carry out his decree, it was sufficient to keep the decree alive.

A suit by a decree-holder to set aside orders passed under Section 246 of Act VIII of 1859, and to declare his right to sell a certain estate as the property of his judgment-debtor in execution of his decree, is a suit in furtherance of the decree, and is a proceeding, within the meaning of the Section under notice, to enforce such decree. *Brojessuree Chowdhrain* v. *Ram Coomar Chowdhry. W. R. Misc. App. VI.* 15. In this case the Court observed:—"The law requires in general terms that some proceeding shall be taken to keep the decree in force. It does not say that such proceeding must be taken in the Execution Department. If proceedings have been carried out in that Department as far as the law allows, and then take the shape of a regular suit to contest the orders passed in the Execution Department, that suit is also a proceeding keeping the decree in force." Compare the case of *Kashee Pershad Roy* v. *Shib Chunder Deb. W. R. Misc. App. II.* 3.

A having on the 26th November 1862, obtained a decree against B in the Court of the Principal Sudder Ameen of Patna, received on the 13th May 1865 a certificate, under Section 285 of Act VIII of 1859, from the Court in which the decree was passed, that it had not been satisfied. A copy of this certificate having been forwarded to the Sheriff of Calcutta on the 26th May 1865, and an application having been made to the High Court, sitting as a Court of Original Civil Jurisdiction, for execution of the decree, that Court, upon the 14th August 1865, granted a rule calling upon B, the judgment-debtor, to show cause why execution should not be enforced. Notice of this rule could not be served, but another rule to the same effect having been subsequently obtained, and notice having been served, an order was passed on the 19th February 1866, for

execution of the decree within the limits of the Original Jurisdiction of the High Court. Against this order B appealed, alleging that execution was barred by the provisions of the Section under notice. In giving judgment in this case PEACOCK C. J. observed:—"This Section is peculiarly worded. It says that 'no process of execution shall issue from any Court not established by Royal Charter unless &c.' It does not introduce words applicable to proceedings taken in a Court established by Royal Charter for the execution of a decree of a Court not established by Royal Charter. It is unnecessary, however, for me to decide whether a Court established by Royal Charter can execute a decree of a Court not established by Royal Charter, where no proceeding has been taken within three years in the original Court to keep it in force, because it appears to me that the case would not be barred if this application had been made to any other Court not established by Royal Charter. For when the Sudder Ameen granted a certificate on the 13th May 1865, the application for that certificate was a proceeding for the purpose of enforcing the decree. Before the Sudder Ameen could issue that certificate, he ought to have been satisfied that it was impossible for the execution-creditor to obtain execution of the decree within the limits of his own Court's jurisdiction; and then it was his duty if he found that it could not be executed there, to certify to some other Court that the judgment remained unsatisfied. It being impracticable to execute the decree in Patna, the execution-creditor applied to the Sudder Ameen to forward it to the High Court with a certificate that it was not satisfied. I don't know what more a person could do for the purpose of keeping a decree alive. The decree-holder endeavoured, as far as he could, to have his decree executed. When it was sent down to the High Court, he applied on the 14th August 1865, to the High Court for an order on the defendant to show cause why it should not be executed. It appears to me that this application was a proceeding within the scope of Section 20, and conse-

quently that this case is not barred by limitation. But if it were requisite to determine whether the application to the High Court for an order on the defendant to show cause, was, or was not a proceeding within the meaning of Section 20, I should have considered it necessary to refer the case for the decision of a Full Bench, inasmuch as there are decisions of this Court contrary to the view I take. It is not necessary, however, for me to determine that point now, for I decide that this case is not barred by limitation, upon the ground that the proceeding in the Sudder Ameen's Court was a proceeding for the purpose of keeping alive the decree within three years preceding the application for execution." PHEAR J. said:—"It seems to me impossible to say that the application, under Section 285 of Act VIII of 1859, to the Court which issued the decree, to transmit a copy thereof for the purpose of execution, was not an application made to the Court within the very words of Section 216, or that the order on such application was not an order passed on application for execution." *Lallah Nundcoomar* v. *Ramdoss. Indian Jurist Rep. N. S. I.* 152.

The expressions used by the Court in deciding various cases arising under this Section, might seem to indicate that these cases were decided with reference to the circumstance of former proceedings in execution, having been *effectual* and *fructuous* on the one hand, or *ineffectual* and *abortive* on the other. But the ruling of the Full Bench in the cases of *Gooroo Doss Akhoobee* v. *Modhoo Koondoo*, and of *Degun Singh*, v. *Ramshay Singh*, must be taken to establish that any *bonâ fide* attempt made within time by a decree-holder to obtain execution of his decree, is, even where unsuccessful, a proceeding which will keep the decree alive. Those of the following cases, therefore, in which it has been held that former proceedings in execution were insufficient to keep a decree in force, can be safely accepted as precedents, only in so far as it may seem to have been the opinion of the Court, that in these cases,

the former proceedings were not taken by the decree-holder in good faith, and with a real desire and intention to obtain satisfaction of his claim.

A decree-holder applied for execution of his decree by the sale of certain property which he alleged to be the property of his judgment-debtor. The property having been claimed by a third party, the decree-holder was summoned by the Court to give evidence, and on his failure to attend, the case was struck off. The decree-holder, subsequently, within three years from the time when his former application was struck off, but more than three years from the date of decree, applied a second time for execution. The Judge dismissed the application as not made in time, and his order was confirmed by the High Court on appeal. The Court observed:—"It is clear that beyond filing a petition, the decree-holder did nothing. We think that the presentation of a petition without any farther steps on the part of a decree-holder, is insufficient to keep alive his right to execute his decree." *Sheikh Idoo* v. *Sheikh Besharoolla. W. R. Misc. App. II.* 10. To the same effect, see the cases of *Taranath Roy* v. *Rajbullub Bhunj. W. R. Misc. App. III.* 2, and of *Ranee Shurut Soonduree Dabea* v. *Chunder Coomar Roy. W. R. Misc. App. VI.* 37.

The mere service of a notice under Section 216 of Act VIII of 1859, on the party against whom execution is applied for, where that notice was returned with an endorsement that the party for whom the notice was intended did not live in the place where it had been served, followed by no subsequent attempt on the part of the decree-holder to amend his mistake, has been held not to be a proper and legal keeping alive of the decree. *Fuezun Beebee* v. *Mazedoonissa Beebee, W. R. Misc. App. IV.* 6; *Sham Chand Bysack* v. *L. T. Lucas, W. R. Misc. App. V.* 5; *Girjanund Oopadhya* v. *Chunder Binode Oopadhya. W. R. Misc. App. V.* 5.

An application having been made by a decree-holder for execution of his decree, notice was issued to the judgment-debtors on

the 24th April 1862, and they appeared on the 13th June following. Nothing was done after that date to carry out the decree, and on the 11th September 1862, the application was struck off, the vakeel of the decree-holder having admitted that he was unable to proceed with the case, as he had received no instructions from his client. A renewed application for execution having been made on the 9th September 1865, it was contended that the application was in time, as made within three years from the time when the former application was rejected. But it was held by the High Court that as there had been no adjudication when the former application was struck off, limitation could not be reckoned from that time, and that as the last proceeding taken by the decree-holder could not be carried down to a period later than the 11th June 1862, the subsequent application was barred. *Doya Moyee Dassee* v. *Debnath Holdar*. *W. R. Misc. App. VI.* 34.

Where an application by a decree-holder for execution of his decree was disallowed by the Court in which the application was made, and an appeal by the decree-holder against this order was struck off the file for default, it was held that the appeal could not be considered to give the decree-holder a fresh point from which to start in calculating the period of limitation when he sought to execute his decree. *Gour Chunder Saha* v. *Gour Mohun Ghose*. *W. R. Misc. App. V.* 11.

Where a decree-holder had, within three years next before an application for execution of his decree, contested and settled by compromise an appeal against that decree by an intervenor, which appeal if sustained would have had the effect of setting the decree aside for want of jurisdiction, it was held by the High Court that this was a proceeding within the meaning of the Section under notice, and saved the application, although made more than three years from the date of the decree. *Jumal Beebee* v. *Syud Khan*. *W. R Misc. App. V.* 19.

A upon the 3rd May 1859, obtained a decree for possession, mesne profits, and costs On the 20th June 1854, he applied

for execution of his decree in respect of costs. The Court in which the application was made, rejected it, as not having been made within three years from the date of the decree. But on appeal to the High Court it was held that as it was admitted by the judgment-debtor that the decree-holder had sued out execution of his decree in respect of mesne profits within three years before the application for execution of the decree in respect of costs, he should, under the terms of the law, and in accordance with the previous ruling of the Court in the case of *Joykurun Lol*, decided upon the 6th February 1866, (not reported,) be considered to have taken effectual proceedings to enforce his decree within the prescribed period. *Oopendur Mohun Mustafee* v. *H. D. Tripp. W. R. Misc. App. V.* 40.

The attachment of a judgment-debtor's property, although the attachment be afterwards withdrawn, is an effectual proceeding within the meaning of this Section to keep alive a decree. *Prossonno Coomar Mookerjee* v. *Ramtonoo Chunder. W. R. Misc. App. V.* 43. From the report of this case it would seem to have been the opinion of the Court, that the limitation should be taken to have run from the time when the attachment was withdrawn.

A holding a decree against B, died. C applied to be admitted as representative of the deceased decree-holder, but his petition was refused on the ground of his not having obtained a certificate under Act XXVII of 1860. Subsequently, after obtaining a certificate, C again applied, but as the application was made more than three years from the date of the decree, the application was held to be barred. On appeal to the High Court, the order of the lower Court was confirmed, and it was observed that the abortive petition presented by C before obtaining his certificate, was not a proceeding, within the meaning of the Section under notice, by which the decree could be kept in force. *Sheo Pertap Lal* v. *Issur Roy. W. R. Misc. App. V.* 23. Compare the case of *Lalla Bishen Dyal Singh* v. *Ram Sunkur Tewaree. W. R. Misc. App. VI.* 38.

Where the original decree-holder fails to execute his decree in time, any right that another party may subsequently establish to a share in the decree can give no fresh starting point from which to compute limitation. *Kashessuree Dabea* v. *Prossonno Nath Sirkar. W. R Misc. App. I.* 31.

Where a party admitting his liability for the judgment debt of an ancestor, settled in Court, a suit brought against him by the decree-holder for the recovery of that debt, by entering into a written compromise in which he engaged to pay the debt by instalments, it was held by the High Court on appeal, that he had clearly rendered himself liable for his ancestor's debt, and that where the decree-holder had applied for execution within three years from the date of the compromise, the Law of Limitation could not be applied to prevent execution, on the ground that previous to such compromise the decree-holder was in laches. *Okhil Chunder Surkhel* v. *Bromho Moyee Dabea. W. R. Misc. App. IV.* 10.

A having in the year 1859, obtained a decree aganst, B, applied for execution in the year 1864, contending that his application was not barred, inasmuch as he had within three years received payments from B, the judgment-debtor, on account of the decree. It was held by the High Court on appeal, that payments made otherwise than through the Court in adjustment of a decree, cannot be recognized as keeping alive the decree. This decision is in accordance with the provisions of Section 206, Act VIII of 1859. The Court observed that "the words of the Act are imperative and allow of no alternative; payments made privately cannot be recognized; and there is therefore no proof in the present case of any proceeding which was legally sufficient to keep the decree alive." *Kedarnath Mahata* v. *Heeraloll Mundul. W. R. Misc. App. IV.* 21. See also the case of *Kalee Pershad Surmah Roy* v. *Khetternath Shaw. W. R. Misc. App. IV* 11.

A having obtained a decree for costs against B, C, D and E, took out execution against all of them and recovered a portion

of his debt from B and C, whom he then released from any further payment under the decree. Within three years from the date of these proceedings, but more than three years from the date of his decree, A applied for execution against the property of D and E, for the amount still due by them under the said decree. The Court in which the application for execution was made, being of opinion that A by releasing B and C, had changed the decree from being a joint decree against all the debtors into a several decree against each particular debtor, refused execution, on the ground that it was barred by limitation under this Section. On appeal this decision was reversed by the High Court. The Court observed :—"The decree is for costs. The petitioner has recovered from one set of judgment-debtors the amount of costs calculated according to their share in the estate which was the subject of suit. He now goes on within three years to recover the amount still due from the other sharers. We think he is entitled to carry on the execution. Limitation does not bar him. He has taken proceedings to enforce the decree within three years of his present application. The decree is not several, and has not become several. The petitioner, acting very fairly, executes his decree against each debtor for the amount which is equitably due from him. There might be circumstances under which the execution of a decree against one debtor might not be sufficient to keep a decree alive against other debtors. But no such circumstances are to be found in this case." *Shaikh Buneead Ali* v. *Juggessur Singh and others. W. R. Misc. App. VI.* 25. Compare the case of *Unnoda Dossee* v. *M. Stephenson. W. R. Misc. App. VI.* 18.

A, B and C, holders of a joint decree, for their private convenience, the judgment-debtor being no party to the arrangement, agreed to split the amount of their decree into three shares, and to realize separately to the extent of their respective shares from the judgment-debtor. Execution was duly taken out by A and B, but C's application for execution was resisted by the

judgment-debtor as not made in time. It was held by the High Court, on appeal, that as the judgment-debtor was no party to the arrangement entered into by the decree-holders, so far as he was concerned, the decree continued to all effects and purposes a joint-decree, for the whole of which he was liable to the whole of the decree-holders; and that although C had not himself taken active steps for enforcing the decree within the period of limitation, reckoned from the date of the decree, his application was not barred, if made within time from the last act in execution by A, or B. It was remarked, that if the judgment-debtor had been a party to the arrangement made by the decree-holders, he might then have looked upon them as having agreed with him to hold separate decrees, each to a certain amount of the original debt, which each might separately enforce; but when he was no party to such an agreement, any private arrangement made by the decree-holders among themselves as to the extent of their shares in the original sum decreed, as it did not prejudice him, could not put him in a better position than he otherwise would have been in, so as to enable him to plead limitation against one or other of the decree-holders who might appear to have slept over his rights. *Ram Buksh Chatterjee and others* v. *Brijo Coomar Mullick.* *W R. Misc. App. I.* 1.

It must be remarked, however, that this decision is opposed to the view taken by the late Sudder Court in the case of *Nobinchunder Bose* v *Radhabullub Gossain. S. D. D.* 1856, p. 248. In that case the petitioner with two others, having obtained a decree for costs, agreed to realize their respective shares separately. The other decree-holders sued out execution within twelve years from the date of decree, but the petitioner applied for execution after the lapse of twelve years, and on that ground the lower Court refused to issue process of execution. On special appeal it was contended that as the decree was in favour of all the holders, and as process of execution had been taken out within twelve years, for the benefit of all, that was sufficient

to keep the decree alive for all interested in its execution. But it was held by the Sudder Court that the petitioner was out of time. The Court observed :—"The decree-holders had agreed to consider their respective interests as separate, and no objection was offered by the judgment-debtor to this mode of execution. Two of the decree-holders acting upon this arrangement sued out execution, but the petitioner neglected to do so within the period of twelve years. He cannot benefit by the act of the parties who sued within time, their interests having been separated from his."

In the year 1845, B and C, against whom A had obtained a decree, entered into an arrangement with A, in which they engaged to pay their debt by instalments in the course of four years. D became surety for B and C, under a bond in which he agreed that upon their failure to pay the debt, or any instalment thereof, he should become liable, and execution might at once be taken out against him. A took no steps as against D, until the year 1856, when he applied for execution against him. D thereupon filed a petition alleging that he could not be proceeded against summarily, which petition was rejected, but no steps were then taken to enforce execution against him. A similar application was again made by A in 1858, but on this occasion also execution was not enforced. From 1858 until the end of 1865, A, from time to time, brought the property of the debtors B and C to sale. Having, at last, exhausted their means, he sought in the beginning of 1866, to realise the balance of his debt from D, alleging that D was by his own act jointly liable with B and C, and that as he, the decree-holder, had kept his decree alive against B and C, he was entitled to proceed against D. The lower Court in which the application for execution was made, considering D to be in the same position as B and C, for whose debt he had made himself liable, allowed execution to issue. But on appeal to the High Court, the view taken by the lower Court was held to be erroneous. The Court observed, that D, as surety, was not jointly and severally liable with

B and C, the judgment-debtors, for the payment of the debt, but was only liable on their failure to pay it. His liability commenced from the time when the debtors failed to pay according to the terms of their kistibundee. The circumstance of D having acquiesced in, and not appealed from the order of 1856, declaring him to be liable to be proceeded against in execution, might prevent him from again pleading non-liability, but that circumstance did not put him on the same footing as the original debtors. Proceedings against one or other of the joint debtors, which would keep the decree alive against them, would not affect him. His was a separate responsibility, and admitting, what was very doubtful, that he could be proceeded against in execution of the original decree, execution should have been taken out against him from the date when his liability commenced, and the decree should have been kept alive as against him by proceedings irrespective of those taken against the original judgment-debtors. As no proceedings had been taken against D, since 1858, the Court was of opinion that the execution applied for was barred by limitation *Hurkoo Singh v. Baboo Ramkissen*, reported in the "Englishman" of the 27th July 1866.

Where a petition for revival of a decree has been filed in time, but has not been disposed of within time owing to the dilatoriness of the Court in which it was presented, the petition ought not to be rejected as barred by limitation, upon the ground that the petitioner was bound to remind the Court of its duty by motion or petition. *Rajah Sutto Surun Ghossal* v. *Nobin Chunder Doss. W. R Misc. App. V.* 6. Compare, *Chowdhry Purladh Mohapattur* v. *Chowdhry Junardun Mohapattur. W. R. Misc. App. VI.* 15.

A holding a decree against B for a certain sum bearing interest until the date of realization, applied for execution. The Court in which the application was made, withheld interest, on the ground that A had been dilatory in taking out execution. But, on appeal it was held by the High Court, that so long as a

decree-holder did not incur the loss of his right by limitation, he could not be deprived of the interest which the decree gave him, and that it was for B to have paid the amount due under the decree if he wished to escape the payment of further interest. *Modhoosoodun Roy Chowdhry* v. *Bhikaree Roy Chowdhry. W. R. Misc. App. V.* 11. Compare, *Oopendur Mohun Mustafee* v. *H. D. Tripp. W. R. Misc. App. V.* 40.

A decree the execution of which is barred by limitation cannot under Section 209, Act VIII of 1859, be charged as a set-off in the execution of a decree which is not barred by limitation. *Prossonno Coomar Ghose* v. *Sham Lal Gungopadhya. W. R. Misc. App. V.* 8. *Hemraj Chowdhry* v. *Asoodun. W. R. Misc. App. V.* 43.

A Court to which a decree is referred for execution, has full power to decide whether or not, the application for execution is barred by limitation. *Buzur Beebee* v. *M. Jackson. W. R. Misc. App. V.* 14.

SECTION 21.

Preceding Section not to apply to judgments, &c, in force at the time of the passing of this Act.

Nothing in the preceding Section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within three years next after the passing of this Act, whichever shall first expire.

IN the case of *Taranath Roy* v. *Rajbullub Bhunj, W. R. Misc. App. III.* 2, an opinion was expressed by LOCH and SETON-KARR J J. that under this Section read together with Section 2, Act XI of 1861, (suspending the operation of Act XIV of 1859,) execution of a decree passed on the 5th June 1860, might be applied for at any time within three years from the first January

1862, when the law *came into operation*. But this decision, which is opposed to earlier decisions of the same Judges,* has been contradicted by many subsequent decisions,† and has eventually been reversed on review. *W. R. Misc. App. VI.* 30. In reversing their former order the Court noticed that the case had formerly been treated as as one under Section 21, but that this was an oversight, as the decree was not in existence when the Limitation Act was passed.

The rule appears to be correctly laid down in the case of *Roghoonath Persaud* v. *Balowatee Begum*, decided on the 5th May 1864, by LOCH and GLOVER JJ., reported in the "Englishman", of the 21st May of that year. In this case application had been made on the 12th September 1862, for execution of a decree passed on the 5th June 1855. In the absence of the judgment-debtor, the Court in which the application was made, passed an order to the effect that under the provisions of Section 2, Act XI of 1861, the application was in time, twelve years not having elapsed since the date of the decree. From this order the judgment debtor appealed to the High Court, contending that under the provisions of Sections 20 and 21 of Act XIV of 1859, the application was barred by limitation, no step to keep the decree alive having been taken within three years after the passing of that Act. The Court held this view to be correct. With reference to the words in Section 21, "within three years next after the passing of this Act," it was observed :—"Act XIV of 1859, was passed on the 5th May 1859, so that the three years prescribed by the Section expired on the 5th May 1862. Act XI of 1861, suspended the operation of Sections 19 to 23 of Act XIV of 1859, to the 1st day of January 1862, but it did not alter the wording of Section 21. Indeed the peculiar wording of

* See the cases of *Lullet Ram* v *Salugram Singh*, *W. R. Misc. App. I.* 9, *Kalee Chunder Chowdhry* v. *Ruttun Gopal Bhadooree*, *W. R. Misc. App. II.* 1 *The Collector of Beerbhoom* v. *Raj Coomaree Dossee*, *W. R. Misc App. II* 17.

† See the cases of *Nawab Hazee Mahomed Khan Kuzulbash* v. *Shahzada Mahomed Bussuroodeen*, *W R Misc. App. IV.* 13, *Dinomonee Banerjee* v. *Modhoosoodun Mookerjee*, *W. R. Misc App IV.* 24, *Bharath Singh* v. *Sadut Ali*, *W R. Misc. App. V.* 20.

that Section, and its effect, was perhaps overlooked. The effect, however, has apparently been that parties having decrees in the predicament described in Section 21,—*i. e.*, in force at the time of the passing the Act,—considered that as the operation of this and other Sections had been suspended until January 1862, limitation would begin to run against them, not from the time of the passing of the Act, but from the time of its coming into operation. Act XI of 1861, however, does not say so. The words of the law are distinct, and the suspending Act did not alter them. As therefore, in the present case no application for execution was made within three years from the passing of Act XIV of 1859, we think that the application now made is out of time and cannot be enforced."

Reference may also be made to the decision of TREVOR and LOCH JJ., *W. R. Small Cause Court Cases. III.* 8; *Mofussil S. C. Ct References*, p. 138, in which it was observed that "Act XI of 1861, only postponed the operation of Act XIV of 1859, until the first January 1862, but that after that date, the new law of limitation had as full operation as if Act XI of 1861, had never been passed."

In the case of *Gregory* v. *Juggut Chunder Banerjee, W. R. Misc. App. V.* 17, the holder of a decree which was in force at the time of the passing of Act XIV of 1859, applied for execution on the 30th December 1864. The Court to which the application was made, refused execution as barred by the terms of the Section under notice. On appeal to the High Court it was held that if it should appear that another application to execute the decree which had been previously made, and under which steps had been taken for the attachment of monies in the hands of the Collector, but which had been struck off the file, was such a "proceeding for enforcing the decree" as would, within the meaning of Section 20, have kept the decree alive; and if it should further appear that such proceeding had been taken within three years next before the second application for execution, that application must be considered to be in time.

It was observed by the Court that on the first application to execute after the passing of the Act, Section 21 would apply; but on the next and subsequent applications, the Court would have to be guided by the rule in Section 20. To the same effect, *Doorgachurn Roy* v. *Dinomoyee Dabea. W. R. Misc. App. VI.* 14.

In the case of *Huro Nath Bose* v. *Muddun Mohun Chuckerbutty, W. R. Misc. App. VI.* 40, it was observed by the Court that the Section under notice was passed in order to give an extension of time to decree-holders whose decrees would have been barred under the new law of limitation, but that it in no way affected decree-holders who come within the ordinary time allowed by the new law for the execution of decrees; since the decree-holder who seeks to execute his decree within three years from the date when a previous proceeding has been taken to enforce such decree, is entitled to have a second process in execution, although his second application be not made within three years from the passing of the Limitation Act. See also *Gopal Kishen Potedar* v. *Ranee Shurut Soonduree Dabea. W. R. Misc. App. VI.* 41.

A decree passed in 1829, was by various proceedings kept alive down to the passing of Act XIV of 1859, and was therefore in force at that time. In the years 1860 and 1861, the decree-holder made certain applications for the execution of her decree, not amounting to proceedings keeping the decree in force. The first real attempt to execute after the passing of the Act, was made on the 9th December 1863. The Court had then no power to execute the decree, and execution ought on that account to have been refused, but under some misconception, certain property was then attached and sold. The sale was, however, set aside by reason of a vital irregularity, and the proceedings came to nothing. A fresh application was made on the 31st March 1865, for attachment and sale of the judgment-debtor's property, when the objection was raised that execution was barred by the Section under notice. The Court in which

the application was made refused execution upon this ground, and the order was confirmed on appeal by the High Court. The Court said:—"We think that process of execution could not be issued in respect of such a decree, except where an effectual* application had been made, either within the time previously limited by law, or within three years next after the passing of the Act, whichever should first expire. No doubt process might have been issued on the application of 1860, if the decree-holder had proceeded with it, and such process would subsequently, under Section 20, have given the decree-holder a fresh period of three years. But we cannot think that the abortive* proceedings of 1863, which were taken wholly without authority, can give the decree-holder any fresh start." *Boroda Dabea* v. *Sreeram Chowdhry. W. R. Misc. App. V.* 20.

In the year 1863, a decree-holder applied for execution of a decree which was in force at the time of the passing of the Limitation Act. No objection was then taken that execution was barred under the provisions of the Section under notice; the execution was proceeded with, and property was attached and sold in 1864. In 1865, the decree-holder again applied for further execution against other property of his judgment-debtor. The Court in which the application was made refused execution on the ground that the execution proceedings in 1863 and 1864, were irregular, inasmuch as they were taken out after the period allowed by the law of limitation. The decree-holder having appealed to the High Court, it was contended on behalf of the judgment-debtor that the case was governed by the decision in the case last cited. The Court observed:—"There is one distinction between the two cases. In that now before us the proceedings in execution after the period allowed by law were not ineffectual,* whereas in the case quoted they were abortive. But we think that the result of the proceedings cannot determine whether they were authorized under the law.

* With respect to the terms "effectual," "ineffectual" and "abortive," see *ante*, p 214

The Judges who tried the appeal in the case referred to were of opinion that proceedings in execution of a decree in force at the time of the passing of the Act, are without authority unless commenced within three years from the passing of the Act. We concur in that view of the law. We consider that the terms of both Section 20 and Section 21 are imperative. Proceedings taken in execution of decrees under either Section, after the time allowed by law, cannot be held to be authorized by the law. If, as in this case, a decree-holder has been allowed to carry out such proceedings without objection on the part of the judgment-debtor and the Court, all that can be said is, that he is fortunate if he has recovered any portion of his decree in such proceedings; but these proceedings remain, nevertheless, proceedings conducted without the authority of law." *Kool Chunder Chuckerbutty* v. *Kumul Chunder Roy. W. R. Misc. App VI.* 17. This decision has, it is believed, been followed in several subsequent cases, but the correctness of the rule which it lays down, may seem open to question. It is submitted that the proceedings taken in 1863, so long as they were not appealed against, or otherwise sought to be set aside, must necessarily be assumed to have been regular, and that it was not competent for the Court to question their regularity when dealing with the subsequent application.

Where the assignee of a decree passed in the year 1857, sues out execution within three years from the passing of Act XIV of 1859, he is in time, and limitation cannot be applied under this Section. *Kurreem Bux Meah* v. *Ramchunder Chuckerbutty. W R V.* 223.

Section 22.

Time for execution of summary award of Civil Court or Revenue Authority

No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue Authority unless some proceeding shall have been

taken to enforce such decision or award or to keep the same in force within one year next preceding the application for such execution.

A DECISION passed under Act XIX of 1841, (an Act for the protection of moveable and immoveable property against wrongful possession in cases of successions,) on a claim to a share of certain property by right of succession, is a summary decision, the execution of which will be governed by the rule of limitation provided in the Section under notice. *Fuezun Beebee* v. *Mazedoonissa Beebee W. R. Misc. App. IV.* 6.

In the case of *Panchanada Chetti* v. *Raman Chetti, Madras High Court Rep. I.* 446, it was held by the Madras High Court, that the execution of the decrees of Mofussil Small Cause Courts, is subject to the limitation of three years prescribed by Section 20, and not to the limitation of one year prescribed by the Section under notice.

SECTION 23.

Preceding Section not to apply to summary awards in force at the passing of this Act.

Nothing, in the preceding Section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within two years next after the passing of this Act, whichever shall first expire.

THE operation of this and the four preceding Sections, was postponed by Section 2, Act XI of 1861, to the first day of January 1862.

SECTION 24.

Operation of Act.

This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits' Settlement; but shall not take effect in any Non-Regulation Province or place until the same shall be extended thereto by public notification by the Governor-General in Council or by the local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor-General in Council or by the local Government to which such Province or place is subordinate, all suits which within such Province or place shall be pending at the date of such notification or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding.

Trial of pending suits, &c., in any non-Regulation Province or place to which the Act is extended.

ACT XIV of 1859, was extended to Assam by a notification dated 11th July 1860, published in the Calcutta Gazette of the 25th August of the same year; to the District of Ajmere and the Province of Mhairwarah by a notification dated the 31st January 1861, published in the Calcutta Gazette of the 20th February of the same year; to the District of Cachar and to

the Districts of Hazareebaugh, Lohardugga, and Beerbhoom, and to the Estate of Dhulbhoom, by a notification dated the 20th February 1860, published in the Calcutta Gazette of the 23rd February of the same year; to the Sonthal Pergunnahs, by a notification dated the 8th December 1862, published in the Calcutta Gazette of the 13th December of the same year; and to the Central Provinces by a notification dated the 1st May 1863, published in the Calcutta Gazette of the 2nd May of the same year.

Act XIV of 1859, was extended to Assam on the 11th July 1860, but by the provisions of the Section under notice, it did not come into operation there until the 11th July 1862. On the 7th July 1864, an application was made to the Deputy Commissioner of Gowalparah in Assam, for execution of a decree passed by the late Sudder Court upon the 30th December 1861, which application was refused upon the ground that by the old Assam Rules, execution should have been taken out within one year from the date of the decree. It was held by the High Court on appeal, that as the decree sought to be executed bore date the 30th December 1861, under the old Assam Rules, execution could have been taken out at any time up to the 30th December 1862, and that as before that date, namely, from the 11th July 1862, Act XIV of 1859 had come into force in Assam, and the old Rules were consequently superseded, the provisions of Section 20 of Act XIV, in conformity with which three years from the date of decree is the time allowed for enforcing its execution, must be applied to the case. *Ram Lochun Sirkar* v. *Prithee Ram Chowdhry*. *W. R. Misc. App. II.* 43. Suits instituted in Assam before the 11th July 1862, must be disposed of under the old Assam Rules.

In a suit instituted in the Court of the Civil Judge of Lucknow on the 13th January 1862, the plaintiff sought to recover certain sums of money advanced to the defendant. The last advance had been made in the year 1858, more than three years before the commencement of the suit, but there was evidence of a part

payment of the debt having been made by the defendant within that period. Three letters were also filed by the plaintiff, which purported to have been written by the defendant in acknowledgment of the debt. Of these letters two which were without signature, seem to have been considered genuine by the Judge; but the third, which bore the defendant's signature, was believed to be spurious. The Judge held the claim to be barred by limitation, and his decision was confirmed by the Judicial Commissioner. But on appeal to the Privy Council, their Lordships were of opinion, that as the suit had been instituted before Act XIV of 1859, came into operation in Oudh, it must be held to be governed by the rules of limitation which were in force there when the action was commenced, and that under these rules, acknowledgment of a debt, either by part-payment, or by an unsigned writing, might suffice to renew the period of limitation. Their Lordships accordingly ordered the case to the remanded for a fresh trial of the issues between the parties with reference to the rules of limitation in force in Oudh when the suit was instituted. *Shah Mukkum Lall* v. *Nawab Imtiaz-ood-Dowlah. W. R. Privy Council Cases. V.* 18. Reference was made in this case to the case of *Saligram* v. *Mirza Azim Ali Beg*, decided by the Privy Council on the 12th November 1864, in which the question as to when Act XIV of 1859 was extended to Oudh, had been considered.

From the report of the case of *Shah Mukkum Lall*, it would seem to have been understood by their Lordships of the Privy Council, that the Limitation Act was extended to Oudh in July 1860, and, consequently, that it came into operation there, in July 1862. Such however is not exactly the case. The Limitation Act has never, as an Act, been extended to Oudh. Under the authority of the Government of India, certain "Rules for the Limitation of Suits" were promulgated in Oudh, in March 1859, with effect from the first of October of that year. In the meanwhile, the Government had in August 1859, authorized the introduction into Oudh of Act XIV of 1859. No.

notification of this extension was then published, but a series of "Limitation Rules for the guidance of the Civil Courts in Oudh," which Rules are almost identical with the provisions of Act XIV, were promulgated by the Oudh Judicial Commissioner in his Circular Order No. 104, dated the 4th July 1860. These Rules, it appears, were intended to come, and did come, into immediate operation, but it was provided that where the former Rules were in any respect more favourable to suitors, they should have the benefit of them for two years. No notification of the extension of the Limitation Act to Oudh has since been published by the Government, although it would seem that application has been made to the Government upon the subject.*

By Section 5, Act XVI of 1865, (an Act to remove doubts as to the Jurisdiction of the Revenue Courts in Oudh in suits relating to land,) it is provided that no suit relating to any undertenure cognizable under the Act shall be debarred from a hearing under the Rules for the Limitation of Suits in force in the Province of Oudh, if the cause of action shall have arisen on, or after the 13th February 1844. By Section 6 of the same Act it is further provided that suits cognizable under the Act which may have been rejected or dismissed on the ground that they were barred by lapse of time under the Rules of Limitation in force in the Province of Oudh, may be revived and heard on the merits, if the cause of action shall have arisen on, or after the date mentioned in the preceding Section of the Act.

* This account of the somewhat unsatisfactory position in which the Law of Limitation stands in Oudh, is taken from the "Oudh Judicial Rules and Circulars from 1858 to 1862," pp. 233-244.

APPENDIX A.

NOTES.

PAGES 2-7.—The following cases relating to the time when the plea of limitation may be raised, should be noted. *Kisto Chunder Chatterjee* v. *Ram Lochun Roy. W. R. Act X Cases. IV.* 47; *Poornima Chowdhrain* v. *J. P. Wise. W. R. VI.* 129; *Parushnath Misser* v. *Shaikh Bundah Ali. W. R. VI.* 132; *Sreenath Bose* v. *Buzl Roheem. W. R. VI.* 178; *Anundee Koonwur* v. *Thakoor Panday. W. R. Misc. App. IV.* 21; *Wise* v. *Jugobundhoo Baboo. W. R. Misc. App. IV.* 10; *Gour Monee Dabea* v. *Nilmadhub Gooho. W. R. Misc. App. V.* 3; *M. Smith* v. *Kishen Chunder Roy Chowdhry. W. R. VI.* 79; *Mahomed Khosal* v. *Lalchand Doss. W. R. V.* 228. *Gour Monee Dabea* v. *Tiluck Chunder Gooho. W. R. Misc. App. VI.* 92.

PAGE 7.—In connection with the cases of *Musst. Beekun Koer* v. *Maharajah Bahadoor*, and *Sheikh Warris Ally* v. *Wuzeerun Beebee*, see also the cases of *Mirza Himmut Bahadoor* v. *Gobindo Panday. W. R. V.* 91; and *Mahomed Anjob* v. *Gouripershad Shaw. W. R. VI.* 62.

The decision in the case of *Okhetoonissa* v. *Koochil Sirdar* is in accordance with the rule of procedure laid down by the Bengal High Court in the case of *J. Hills* v. *Issur Ghose. Indian Jurist Rep. I.* 25. The rule of procedure followed by the Madras High Court is different. In the case of *Makudu Ravellan* v. *Mastan Sahib, Madras High Court Rep. I.* 102, it was held that on special appeal, the respondent has no right to take any objection to the decision appealed against, which he might have taken if he had himself preferred a special appeal.

PAGE 10.—In computing the period within which a suit to contest the justice of a Survey award should be brought

under Clause 6, Section 1 of Act XIV of 1859, it was held in the case of *Rumonee Soonduree Dossee* v. *Punchanun Bose*, *W. R. IV.* 105, that the day on which the award was passed should be excluded.

PAGE 12.—The decision in the case of *Mihee Ram Gogooee* v. *Holee Ram Doss*, *W. R. VI.* 40, follows the decisions in the cases of *Rajkisto Roy* v. *Denobundhoo Surmah*, and *Tarinee Churn Singh* v. *S. E. Collis.*

PAGE 13.—The time which intervenes between the putting in stamps and obtaining a copy of the decree, should be excluded from the time prescribed for the presentation of an appeal. *Lal Gopalnath Sahee Deo* v. *Pudum Koonwur. W. R. Misc. App. V.* 44. This rule however does not apply to appeals from judgments of the High Court sitting as a court of ordinary original civil jurisdiction. *J. E. S. Elias* v. *Habool Mooshee Mooshee. Indian Jurist Rep. N. S. I.* 18.

In the case of *Shahzada Woola Gowhur* v. *Shah Rukh Begum*, *W. R. VI.* 19, it was held that where the Dusserah vacation intervened between the date of the judgment and the expiry of the ninety days allowed, under Section 377, Act VIII of 1859, for a petition for review, and the petition for review was filed on the first open Court day after the holidays, the holidays were to be reckoned as *dies non.*

PAGE 14.—The decision in the case of *Gour Monee Dossee* v. *Jugobundoo Bose*, is in conformity with the earlier ruling of the High Court in the case of *Sheikh Mozhur Hossein* v. *Mohunt Ram Churn Bhukut*, decided on the 31st May, and reported in the "Englishman" of the 14th June 1864.

The view taken by the Court in the case of *Sham Chand Koondoo* v. *Kallykanth Roy*, has been followed in the subsequent cases of *Dwarkanath Hazra* v. *Ram Koomar Shaha. W. R. V.* 207, and *Moulvie Aboo Mahomed Abdool Khader* v. *Husrutoollah. W. R. VI.* 39.

PAGE 15.—In connection with the remarks upon the ruling of the Court in the case of *Issur Persaud* v. *Oorjoon Lall*,

reference may be made to the cases of *Munna Jhunna Koonwur* v. *Laljee Roy*, and *Kisto Doss Surmokar* v. *Nilmadhub Surmokar*, cited at page 186.

PAGE 16.—Where a person is admitted as a co-plaintiff, under Section 73, Act VIII of 1859, after the institution of a suit, it has been held that limitation should be reckoned against him, not up to the date when he was admitted as a party to the suit, but up to the date when the original plaint was filed. *Kalee Kishore Chatterjee* v. *Luckhee Dabea Chowdhrain. W. R. VI.* 172.

In a suit for possession after dispossession in pursuance of the terms of a Soleenamah inimical to the plaintiff's interests, executed by the plaintiff's guardian during the plaintiff's minority, it was held by the High Court, reversing the judgment of the lower Courts, that the plaintiff's cause of action might be taken to have arisen from the date of his dispossession, and not from the date of the execution of the Soleenamah, nor from the date on which the plaintiff became aware of its existence. The Court observed that in such a case the series of acts which injured the plaintiff must be considered to be his cause of action, and not the first of them only in point of time. The existence of the Soleenamah, so long as it was not acted upon, and so long as the plaintiff remained in possession, could not materially affect him. It was only when the Soleenamah was acted upon, and the plaintiff dispossessed under it, that it became necessary for him to have recourse to the Court. *Rutnessur Paul Chowdhry* v. *Dhununjoy Shikdar. W. R. VI.* 18.

PAGE 22.—For some remarks on the effect of the Indian Limitation Act in barring the remedy, without affecting the right, see the case of *Boloram Gooy* v. *Kameenee Dossee. W. R. IV.* 108.

PAGE 23.—Where a Court after hearing a suit decides an issue of limitation in favour of the plaintiff, but nonsuits him upon other grounds, the decision upon the point of limit-

ation is not to be taken as conclusive in a fresh suit, between the same parties, with regard to the same subject-matter. *Bindabun Chunder Sircar Chowdhry* v. *Muddun Mohun Chunder Chowdhry. W. R. IV.* 104.

In the case of *Daud* v. *Nathi, Indian Jurist Rep. N. S. I.* 112, it was held by the Bombay High Court, that a claim by a Mahomedan woman for dower is not a suit for "breach of contract," within the meaning of Clauses 9 and 10 of Section 1 of Act XIV of 1859, but rather falls to be disposed of under Clause 16 of the said Section and Act; and further, that limitation does not begin to run in the life time of her husband, against a Mahomedan woman's claim for dower, until she has demanded such dower. Compare the case of *Ameeroonnissa* v. *Moradoonissa, Moores' I. A. C. VI.* 211. In the case of *Oomdah Begum* v. *Mahomed Faez, W. R. VI.* 111, it was held by BAYLEY and E. JACKSON JJ. that a Mahomedan wife's dower in the hands of her husband is to be considered as her estate held by him in trust. If this view be correct, the rule of limitation to be applied in a claim for dower would rather seem to be that provided under Section 2, Act XIV of 1859.

PAGE 26.—A suit to enforce the right of pre-emption must be brought within one year from the time when the purchaser takes possession under the sale sought to be impeached; and no extension of time can be allowed upon the ground that the party claiming the right of pre-emption has been suing for possession of a share of the estate, his alleged title to which formed the basis of the claim to pre-emption. *Shah Mohsun Ali* v. *Neknam Singh. W. R. VI.* 131.

As against a third party claiming a right of pre-emption, oral evidence is not admissible to show that it was intended that a written deed, purporting to be a deed of absolute sale, should operate not as an absolute sale, but merely as a conditional sale. *Moolook Chand Surmah* v. *Cooloo Chunder Surmah. W. R. V.* 76.

PAGE 27.—For some remarks upon the meaning of the words "damages for injury to personal property" as used in Clause 2, Section 1, Act XIV of 1859, see pages 114, 115.

In the case of *A. J. Forbes* v. *Meer Mahomed Kazem Chowdhry, W. R. V.* 277, it was held that a suit for damages to the extent of the injury sustained, brought under Section 3, Act X of 1836, against a party who had induced ryots under contract with the plaintiff to cultivate indigo, to break that contract, is governed by the rule of limitation provided under Clause 16, and not by that provided under Clause 2, of Section 1 of the Limitation Act. The Court observed:—"Clause 2, Section 1 of Act XIV of 1859, is not applicable to this suit, which is not a claim for a pecuniary penalty or forfeiture for the breach of any Law or Regulation, but a suit for damages to the extent of the injury sustained by the plaintiff. Section 3, Act X of 1836, does not enact that a pecuniary penalty or forfeiture shall be recoverable for a breach of the said Act; it merely lays down how, and to what extent, a party who is injured by another party prevailing upon ryots who have entered into a lawful contract with him to break that contract, can recover damages."

As to the time when the cause of action is to be taken to have accrued in a suit for damages for injury to the reputation, see the case of *Robert and Charriol* v. *Lombard. Indian Jurist Rep. N. S. I.* 192.

PAGE 29.—In conformity with the decision in the case of *Sheikh Amjud Ali* v. *Syud Ali Buksh*, see the case of *Radhanath Dutt* v. *Gobind Chunder Chatterjee*, cited at pages 58-60.

The definition of the word "servants" given in the case of *Kistomohun Roy* v. *Roop Chand Auddy*, does not appear to have been recognized by the Court in the case of *Nitto Gopal Ghose* v. *A. B. Mackintosh. W. R. Referred Cases. VI.* 11. In this case the plaintiff sued on the 11th April 1866, for balance of pay due to him as mookhtear of the defendant from April 1863, to June 1865, at fifteen Rupees by the

month. The defendant pleaded that the plaintiff's claim for all pay due up to the end of March 1865, was barred by limitation. The Judge of the lower Court in disposing of the case observed :—"By Clause 2, Section 1 of Act XIV of 1859 a period of one year from the time when the cause of action arose is applicable to all suits by "servants" for the recovery of wages. If the word "servants" in the Clause quoted, means all kinds of servants, then the plaintiff would not be entitled to recover pay for that period which is more than a year from the date of the institution of his suit. But the circumstance of the word "servants" being used in connection with the words "artizans, or labourers," and the employment in the Clause of the word "wages," lead me to think that the Clause was not intended to include any other kind of servants than the domestic and menial. The plaintiff being a mookhtear, with the general powers of an agent for the defendant, his case, I am of opinion, is governed by the provisions of Clause 16, Section 1 of the Limitation Act which prescribes six years as the period of limitation." The case having been referred to the High Court for an opinion on the question of limitation, the Court certified that the view taken by the lower Court was correct, in so far as it had decided that the suit was not barred by the limitation of one year. But it was intimated that if there was an engagement of the plaintiff, with a distinct contract to pay him at the rate of Rupees fifteen by the month, the limitation prescribed in Clause 9, Section 1 of the Act would probably apply, and not that laid down in Clause 16.

As to the wages of a Factory Gomastah, see the case of *Nobin Chunder Mozoomdar* v. *T. J. Kenny. W. R. S. C. Ct. Cases. V.* 3, cited at pages 130-132.

PAGE 30.—Sales of land for arrears of Government Revenue were formerly regulated by Act I of 1845, the 24th Section of which provided that suits to set aside such sales should be brought within one year from the date when the sale would otherwise have become final. Act I of 1845 was

repealed, but re-enacted with modifications, by Act XI of 1859. As to the sale of moveable property for arrears of Revenue, see Section 44, Regulation XIV of 1793.

PAGE 31.—In connection with the case of *Syed Mahomed Afzul* v *Kanhya Lal*, reference may be made to the cases of *Sreemutty Dossee* v. *Sheebunee Dabea. W. R V.* 123, and *Purmonund Dutt* v. *Shaikh Khoda Buksh. W. R. V.* 213.

PAGE 33.—In connection with the case of *Sheikh Golam Nujee* v. *Beebee Suboorun*, see the case of *Lallá Beharee Lal* v. *Lalla Modhoo Pershad. W. R. VI.* 69.

PAGE 37.—As to the limitation applicable in a suit to set aside a sale in execution of a decree against a Hindoo widow, see the cases of *Ramlall Sirkar* v. *Greesh Chunder Lahooree. W. R. I.* 145, and *Mohendronath Bose* v. *Syed Ameer Ali. W. R. II.* 271.

As to what should, or should not be considered "payments under protest" within the meaning of Clause 4, Section 1, Act XIV of 1859, see the cases of *Boykunt Nath Bhooya* v. *Ram Nath Bhooya. W. R. S. C. Ct. Cases. IV.* 9, and *Kebul Ram* v. *The Government. W. R. V* 47

PAGE 43.—In the case of *Hurry Pershad* v. *Rughoobur Singh. W. R. VI.* 75, it was held that the proceedings of a Survey Officer in carrying out the *butwarrah*, and fixing the boundaries of B's estate, were in no sense an award or order binding upon A, who had been no party to these proceedings; and consequently that A's claim to recover certain lands which had been included by the Survey Officer in preparing a map of B's estates, was not governed by the special law of limitation provided under Clause 6, Section 1, Act XIV of 1859.

PAGE 47.—The view expressed by the Court in the case of *Ranee Luckhee*, may be thought open to doubt.

PAGE 48.—The provision in Clause 8, Section 1, Act XIV of 1859, relative to "suits for the rent of any buildings or lands," and its construction with reference to the provisions of Sections 23 and 32, Act X of 1859, were discussed in the case of *Mod-*

hoosoodun Paul Chowdhry v. *J. Poulson. W. R. Act X Cases. II.* 21, in which it was held unanimously by a Full Bench that suits for arrears of rent brought under Act X of 1859, are altogether unaffected by the provisions of the Limitation Act. It was observed in this case by NORMAN J. that the word "lands" as used in the Clause under notice, might have a sufficient meaning given to it by treating it as a term subordinate to "buildings," *i. e.*, as applying to buildings and lands appurtenant thereto.

PAGE 50.—As to the time when the cause of action arises in a suit for work and labour, see the case of *Potitpabun Sein* v. *Chunderkanth Mookerjee*, reported in the "Englishman" of the 23rd July 1866.

PAGE 54.—In the case of *A. J. Forbes* v. *Meer Mahomed Kazem Chowdhry, W. R. V.* 277, it was held by BAYLEY and KEMP JJ. that where in a written but unregistered contract to cultivate indigo, it was stipulated that a lump sum should be paid as liquidated damages in the first year in which a breach of the contract took place, a suit for damages for two years' breach must be brought within three years from the first breach.

In another suit for breach of an indigo contract brought by the same plaintiff, it was held, on a reference to the Full Bench, that where the contract sued on in fact includes a series of contracts each complete in itself, and stipulates a distinct time for the fulfilment of each, the breach of each one of the series of contracts, as it occurs, affords a distinct cause of action from which limitation is to be reckoned Accordingly, where the contract as regards the cultivation of indigo in each year is complete, and damages are stipulated for each breach, such damages may be claimed separately for each year. *A. J. Forbes* v. *Mohee Sahoo.* No. 970 of 1866.

PAGE 58.—As to the period of limitation to be applied in suits for the price of goods sold by "wholesale," and in suits for money lent, see the case of *Dhurumnarain* v. *Brijodass*, reported in the "Englishman" of the 12th September 1866.

PAGE 64.—In the case of *Rajnarain Singh* v. *Koonwur Dowlut Singh*, *W. R. VI.* 49, it was held by NORMAN and CAMPBELL JJ. that a suit for damages for the defendant's breach of contract, in not giving the plaintiff a valid title to certain shares in immoveable property which the defendant professed and agreed to sell, was governed by the limitation prescribed in Clause 9 or 10 of Section 1 of the Limitation Act, and not by that prescribed in Clause 2 of that Section.

In the case of *Jussorut Khan* v. *Kanyeloll Dey*, reported in the "Indian Daily News," of the 13th August 1866, the plaintiff sued the defendant in the Calcutta Court of Small Causes upon an unsatisfied judgment of that Court dated the 13th March 1860. By Rule No. 34 of the "Rules of Practice for the Calcutta Court of Small Causes," drawn up under the provisions of Section 41, Act IX of 1850, it is provided that "no warrant of execution shall issue upon any judgment or order of the Court after the expiration of three years from the date of such judgment or order, but that the parties in such a case shall institute a suit or action *de novo* on such unsatisfied judgment or order." The plaintiff's suit was brought in conformity with the above Rule upon the 27th February 1866. It appeared at the trial of the case, that no attempt had been made by the plaintiff to execute his original judgment since the 6th October 1860, when he took out a body-warrant, which was returned unexecuted on the 8th November of the same year. The defendant treating the plaintiff's claim as in reality nothing more than an application for enforcing the original judgment, pleaded limitation under Section 20, Act XIV of 1859, on the ground that no proceeding had been taken to enforce the said judgment within the three years next preceding the application. For the plaintiff on the other hand it was contended, that the suit must be considered to be a "suit upon a debt of record in a case governed by English Law," within the meaning of Clause 11, Section 1 of the Limitation Act, and so governed by the twelve years rule of limitation.

The Small Cause Court Judge being of opinion that the claim was, as urged by the defendants, in reality no more than an application for enforcing execution of the original judgment by a procedure analogous to the English procedure by revivor, held that the suit was barred under Section 20 of Act XIV of 1859. But the question having been referred for the opinion of the High Court, the view taken by the lower Court was held to be erroneous. PHEAR J. said :—" The Judge considers this suit as nothing more than a revivor of the original suit. Now I take it to be beyond dispute, that the final judgment of a competent Court, whether of Record or not, constitutes an original cause of action. In *Williams* v. *Jones*, 13 M. & W. 628, which was a suit brought on a judgment of an old County Court, Baron Parke says ;—'The principle on which 'this action is founded is, that where a Court of competent 'jurisdiction has adjudicated a certain sum to be due from 'one person to another, a legal obligation arises to pay that 'sum, on which an action of debt to enforce the judgment may 'be maintained. It is in this way, that the judgments in 'Foreign and Colonial Courts are supported and enforced, and 'the same rule applies to inferior Courts in this country, and 'applies equally whether they be Courts of Record or not.' Later cases, doubtless, have decided that judgments of the modern County Courts cannot be sued on, but that is because there are peculiarities in the nature of the judgments of these Courts which cause them not to be final. But the reason of the exception is to be found solely in the terms of the modern County Court Act. I find no reason of a like kind in the Act constituting the Calcutta Court of Small Causes, to make its judgments fall short of a cause of action, and moreover it appears that in Rule No. 34, the Court itself recognizes its own judgments as a good and sufficient cause of action for a new suit. I consider the cause of action which was sued upon in this case to be the judgment of the 13th March 1860, and that it first arose on that date. The question then put

to me comes to this, whether this is such a cause of action as falls within Clause 11, Section 1, Act XIV of 1859. I certainly think that the cause of action sued on is "an obligation of record" in the strict sense of the word. But it has arisen as between a Mahomedan and a Hindoo. They are not persons entitled to the personal privilege of having exclusively English Law administered to them. It, therefore, seems to me that this case does not come within the category of cases intended by the words 'cases governed by English Law.' I am of opinion that the words of the Clause which refer to English Law, do not mean merely the Law formerly administered by the late Supreme Court, or now by the High Court sitting as a Court of ordinary original civil jurisdiction, but are intended to point out a class of cases, in which, as between the parties, exclusively English Law must be administered. Clearly this is not one of that class of cases." The case was accordingly returned to the Small Cause Court Judge with an intimation of Mr. Justice Phear's opinion, that it was not governed by the provisions of Clause 11, Section 1 of Act XIV of 1859, but that it might fall to be disposed of, as a suit for which no period of limitation was expressly provided, under Clause 16 of the same Section and Act.

PAGE 65.—The decision of the Bengal High Court in the case of *Parushnath Misser* v. *Shaikh Bundah Ali, W. R. VI.* 132, would seem to be opposed to the ruling of the Madras High Court in the cases of *Kadarsa Rautan*, and *Chetti Gaundan.*

PAGE 67.—The circumstance of a survey award having been made in the plaintiff's favour, that award not having been followed by possession, is no answer to a plea of twelve years adverse possession by the defendant subsequent to the date of the award. *Juggut Chunder Roy* v. *Allyat Chinaman W. R. V.* 242

PAGE 68.—In the case of *Raj Narain Dutt* v. *Gour Monee Dossee, W. R. VI.* 215, it was observed by the Court that "so long as the relation of landlord and tenant lasts, no limitation

runs in favour of the tenant as against the landlord, under Clause 12, Section 1, Act XIV of 1859, because there is no cause of action. Nor does the mere denial by the tenant of the landlord's right, put an end to the relation of landlord and tenant, so as to enable the tenant to treat his possession as adverse to his landlord. So long as the tenant remains in possession he is estopped from denying the title of the person who put him in possession."

PAGE 81.—The case of *Kashee Chunder Nag and others* v. *Kalee Koomar Nag and others, W. R. VI.* 180, is distinguishable from that of *Seeboo Persaud Doss*. In this case one Ram Kant having died, leaving a widow and three persons A, B and C who at that time were his reversionary heirs, the widow waiving her life interest in her husband's estate, ceded it to A, B and C, the three reversioners, accepting maintenance in lieu thereof. From the time of this cession A, B and C, and their descendants remained in possession of the estate. On the death of the widow more than forty years after the death of her husband Ram Kant, the plaintiffs instituted a suit for possession of Ram Kant's property in which they alleged that owing to the ancestor of the defendants having predeceased their—the plaintiffs'—ancestors, they—the plaintiffs—were then the heirs of Ram Kant to the exclusion of the defendants. The lower Courts considering that during the lifetime of the widow, the defendants must be considered to have held possession as her agents, and that the plaintiffs' cause of action arose upon her death, and holding the plaintiffs' title as heirs of Ram Kant to be established, gave judgment in their favour. But on special appeal to the High Court, it was held by TREVOR and CAMPBELL JJ. that as in a former suit, during the life-time of the widow, between the same parties, the widow's right to maintenance, as distinguished from a right to hold the property in dispute, had been declared, and as it is undoubted law that a widow can relinquish her rights in favour of her husband's heirs, the property must be taken to have vested in A, B and C,

from the time when under their arrangement with the widow they came into possession of it, and that the death of the widow, gave no new cause of action to the plaintiffs; and, consequently, that the plaintiffs who had instituted their suit after the defendants had held possession for very many years, were barred by limitation.

PAGE 90.—With the case of *Ombika Churn Sett*, compare the cases of *Nobin Kishore Bannerjee* v. *Hurreehur Mookerjee. W. R. V.* 251; *Hurreehur Mookerjee* v. *Teencowree Dossee. W. R. VI.* 170; and *Gopal Mal* v. *Bydonath Ojha. W. R. VI.* 170.

PAGE 96.—Where a Hindoo widow from the time of her husband's death, up to within twelve years of the institution of a suit brought by her for maintenance, has been maintained out of her husband's estate, the limitation provided under Clause 13, Section 1, Act XIV of 1859, cannot be applied. *Luckhee Monee Dabea* v. *Ahollya Bhai Dabea. W. R. VI.* 37.

PAGE 103.—To the same effect as the case of *Mon Mohinee Dossee*, see the cases of *Sheeb Doss Kayet* v. *Rajah Pertaub Chunder Singh. W. R. I.* 111; *Boodha Moodha* v. *Shaikh Khyrat Ali. W. R. V.* 269; *Gobind Chunder Shaha* v. *Kissen Chunder Shaha, W. R. VI.* 110; *Shaikh Goburdhun* v. *Shaikh Tofail. W. R. VI.* 190.

PAGE 108.—With the cases of *Bhugwan Chunder Bose*, and *Heera Monee Dabea*, compare the cases of *Moharanee Odhiranee Narainee Koonwaree* v. *Nobo Lal Khan. W. R. V.* 191, and *Romanath Ruckhit* v. *Sristeedhur Sawunt. W. R. VI.* 58.

PAGE 112.—In connection with the case of *Rajah Ojoodhyaram Khan*, see also the case of *Nawab Sidhee Nazir Ali Khan* v. *Oojoodhyaram Khan. W. R. Privy Council Cases. V.* 83, and the decisions there referred to.

PAGE 121.—With the case of *Dwarkanath Moitro* v. *T. J. Kenny*, compare the case of *Ishur Chunder Mookerjee* v. *Kashinath Roy Chowdhry W. R. V* 297.

PAGE 122.—From the report of the case of *Jussorut Khan* v. *Kanyeloll Dey*, cited *ante* p 243, it would seem to have been the opinion of PHEAR J that not only the judgments of Foreign Courts but also the judgments of Courts in this country afford causes of action which may be sued on at any time within six years from the date of such judgments.

In the case of *Roop Narain Singh* v. *Jhisoman Koonwur*, *W. R. VI.* 165, the plaintiff sued to set aside a deed of sale and to obtain possession of certain property. From the evidence it appeared that a decree for the possession of the property in dispute had been obtained in a suit on the same deed of sale brought by the defendant against the plaintiff's guardian. It was held by the High Court, reversing the decision of the lower Courts, that the plaintiff's suit was in fact a suit to set aside the former decree; that such a suit could only be maintained on the ground of fraud, and must be brought within six years from the date of the decree sought to be set aside, unless it could be shewn that the plaintiff had been fraudulently kept in ignorance of the transactions impugned, up to a time within six years of suit, so as to give him the benefit of the provisions of Section 9 of the Limitation Act. Section 10 of the Act would, however, seem to be the Section properly applicable to a suit to set aside a judgment on the ground of fraud.

PAGE 126.—The following additional decisions in respect of mesne profits should be noted. *Luchmun Singh* v. *Beebee Miriam*. *W. R. V* 219; *Balum Bhutt* v. *Bhoobun Lall*. *W. R. VI* 78; *J. Grey* v. *Anundo Mohun Mitter*. *W. R. VI.* 108; *Raj Coomaree Dossee* v. *The Nawab Nazim of Bengal*, *W R. VI.* 113; but see the case of *Joykurun Lal* v. *Rance Asmudh Kooer*, *W. R V.* 125, in which it was held, by PEACOCK C. J. and L. S. JACKSON J. that the right of action for mesne profits, in the case of a person who has been dispossessed under a judgment of a Court of competent jurisdiction, and afterwards restored to possession under a judgment of the

Privy Council, does not accrue before the judgment of the Privy Council has been pronounced.

In the case of *Heeranund Sahoo* v. *Musst. Oozeerun*, *W. R. VI.* 151, the plaintiff sued the defendant for six years *malikana* allowance. It appeared from the evidence that on a settlement made by the Government with the defendant's ancestor as mokurureedar, a certain sum was remitted from the revenue payable under the settlement, to provide for *malikana* allowance to be paid to the ancestor of the plaintiff. The defendant pleaded limitation, and as the plaintiff was unable to show that he, or those through whom he claimed, had received any payment from the defendant, on account of *malikana* within twelve years of suit, it was held by the lower Court that the claim was barred. On special appeal, however, it was ruled by BAYLEY and SUMBHOONATH PUNDIT JJ., upon grounds which are not very clearly stated in their judgment as reported, that the plaintiff's action was maintainable for all *malikana* which became payable within six years prior to the institution of the suit.

PAGE 128.—In the case of *Oomdah Begum* v. *Mahomed Faez*. *W. R. VI.* 111, it was held by BAYLEY and E. JACKSON JJ. that the dower of a Mahomedan woman in the hands of her husband is to be considered as her estate held by him in trust for her, and on her death divisible among her heirs; further, that the limitation applicable to a suit by her heirs for their share of the dower is not that prescribed for suits on contracts, but that prescribed for suits to recover inheritance, since the claim is not founded on contract, but on the withholding the estate of the deceased from her heirs. But compare the case of *Beebee Jameela* v. *Syud Mahomed Hossein*, reported in the "Englishman" of the 4th July 1864. As to the old law of limitation on this subject, see *Macpherson's Civil Procedure. 4th ed. p.* 75.

The applicability of the provisions of Section 2 of the Limitation Act to such constructive trusts as are indicated in the

cases of *Salehoonissa Khatoon* v. *Khyroonissa*, *W. R. V.* 238, and *Bungshee Deb Surmah* v. *Chunder Kant Surmah*, *W. R. VI.* 61, is perhaps open to question.

PAGE 130.—In the case of *Taranath Dutt* v. *The Collector of Sylhet*, *W. R. Waste Land References. V.* 1, it was held that a Court constituted under Act XXIII of 1863, has no power to extend the period of thirty days allowed by Section 5 of that Act for preferring a suit to contest an award of the Board of Revenue; and that the filing of a vakalutnamah is not an institution of such a suit.

A number of examples of shorter periods of limitation than those prescribed by Act XIV of 1859, are given by Mr. W. M. Bourke in his treatise on the Limitation of Suits in India. His enumeration, however, is not exhaustive, and the following instances which he has omitted may likewise be noticed.

By Section 25, Act XXVIII of 1860,—for facilitating the settlement of boundary disputes in the Madras Presidency,—regular suits of the nature of an appeal to set aside the decisions of Settlement Officers under that Act, should be instituted within two months from the date of such decisions.

Section 111, Act IX of 1850,—constituting the Courts of Small Causes in the Presidency Towns,—provides that all actions and prosecutions against any person for anything done in pursuance of the Act, shall be commenced within three calendar months from the date of the act complained of. The same period of limitation is provided under Section 53, Act XXIV of 1859, and under Section 4, Act V of 1861, for actions and prosecutions against Mofussil Police Officers, and under Section 21 of Act XXIII of 1857,—the Volunteer Act,—for actions against any person for anything done in pursuance of that Act. Similarly, under Section 49, Act XXXI of 1860,—relating to the manufacture, sale, &c., of arms,—suits brought under that Act must be instituted within three months from the accrual of the cause of action.

Under Act IX of 1860, claims arising out of disputes as to wages &c., between employers and workmen engaged in Railway and other public works, may be tried before a Magistrate invested with special powers to try such claims, if preferred within six months from the date on which the cause of action arose.

By Clause 1, Section 24, Regulation II of 1819, a period of one year is prescribed as the time within which persons whose lands are assessed under that Regulation, may institute suits in the Civil Courts to set aside such assessment.

By Section 9, Act XXV of 1857,—relating to the forfeiture of property for mutiny,—suits to establish claims to forfeited property must be brought within one year from the date of the seizure of the property claimed. A similar provision is contained in Section 20, Act IX of 1859, as to the construction of which Section, see the case of *Gobind Pandey* v. *Heemut Bahadoor. W. R. VI.* 42.

Under Section 1, Act XII of 1855, the Executors, Administrators, or Representatives of any person deceased, may maintain actions for any wrong committed in the life time of such person which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by the deceased; provided such wrong has been committed within one year before the death of such person, and the action is brought within two years from the commission of the wrong. Questions may possibly arise as to the effect to be given to this provision with reference to the terms of Clause 2, Section 1 of Act XIV of 1859.

Under Act XIII of 1855,—for providing compensation to families for loss occasioned by the death of a person caused by actionable wrong,—an action is maintainable against the wrong doer, if brought within twelve calendar months from the death of the deceased.

PAGE 132.—In accordance with the decision in *Ramnarain Chowdhry* v. *Bhugwan Jogey*, see the case of *Gour Beebee* v. *Kissen Misser. Indian Jurist Rep. N. S. I.* 224.

PAGE 165.—In the year 1840, A mortgaged certain lands to B, under a mortgage deed in which it was stipulated that in default of payment in 1849, B should take possession. In 1847, A sold the same lands to C. In the year 1860, B sued for, and obtained a decree for foreclosure as against A, and in 1865, he instituted a suit against C for possession of the mortgaged lands. As it appeared from the evidence that C had been in possession from the date of his purchase in 1847, the Court held that B's claim was barred under Clause 12, Section 1, Act XIV of 1859. The Court observed:—"We think it clear that the plaintiff's right of action, that is, his title and power to demand present possession, accrued in 1849. The decree in the foreclosure suit gave him no new starting point, and can in no way affect the right of the defendant C, who was no party to that suit." *Huro Chunder Gooho* v. *Gudadhur Koondoo. W. R. VI.* 183. Compare the case of *Tarachurn Koondoo Chowdhry* v. *Khelut Chunder Ghose, W. R. VI.* 269.

PAGE 172.—In further illustration of the provisions of Section 9, see the case of *Dhurumnarain* v. *Brijodoss*, reported in the "Englishman" of the 12th September 1866.

PAGE 176.—In accordance with the case of *Kalee Doss Chatterjee* v. *Beharee Loll Mookerjee*, see also the case of *Poorun Singh* v. *Kasheenath Singh. W. R. VI.* 20.

In a suit by a minor through his guardian, mesne profits may be claimed for a longer period than six years, since the minor on attaining majority might have claimed for a longer period. *Shahzada Woola Gowhur* v. *Shah Rukh Begum. W. R. VI.* 19; compare the case of *Russo Monee* v. *Indro Monee Chowdhrain W. R. I.* 132.

PAGE 186.—The view taken by the Court in the case of *Nundoo Lall Sirkar*, has been followed in the case of *Bissessuree Dabea* v. *Chunder Madhub Chuckerbutty, W. R. VI.* 184, in which it was held by a majority of a Full Bench of the Court, that the time during which a previous litigation in a Court of competent jurisdiction terminating in a non-suit was

pending, cannot under Section 14, Act XIV of 1859, be deducted in computing limitation The meaning of the expressions "*bonâ fide* and with due diligence," and "from defect of jurisdiction or other cause" as used in the Section referred to, will be found fully discussed in this case From the views expressed by a majority of the Judges in this case, it may be inferred that the decision in the case of *Golab Koonwur*, cited pp 187-188, would not now be accepted as a precedent.

PAGE 191.—In a suit by a mortgagee for possession of certain lands which had been included in the mortgage deed, against a person who subsequently to the date of the mortgage had purchased these lands from the mortgagor, it has been held that limitation runs from the time when the mortgagee was, by the terms of the mortgage deed, entitled to possession, and that the pendency of a previous suit by the mortgagee against the mortgagor for foreclosure, affords no ground for a deduction in computing limitation. See the cases cited *supra*, in note to page 165.

PAGE 203.—The case of *Anundo Moyee Dassee* v. *Poorno Chunder Roy*, will be found reported, *W. R. Misc. App. VI.* 69.

PAGE 204.—In the case of *Tarucknath Mookerjee* v. *Maharajah Mahatab Chand Bahadoor*, *W. R. Misc. App VI.* 94, it was held by LOCH and L. S. JACKSON JJ., that the period to be allowed for executing the decrees of the High Court on the appellate side, is that provided under Section 19, and not that provided under Sections 20 and 21 of Act XIV of 1859.

PAGE 207.—With the cases of—*Singh* v. *Lalla Kalee Churn* and *Huree Bungsho Bannerjee* v. *Ramessur Bannerjee*, may be compared the case of *Ram Ruttun Banerjee* v. *Ameer-oolmolk Bunwaree Gobind Bahadoor*, *W. R. Misc. App. VI.* 95, in which the interpretation to be given to the word "judgment" as used in Section 20 of Act XIV of 1859, was discussed.

PAGE 211.—The judgment of the Full Bench in the referred cases of *Gooroo Dass Akhoobee* and *Degun Singh*, is reported *W. R. Misc. App. VI.* 98.

PAGE 212.—With the case of *Brojessuree Chowdhrain* v. *Ram Coomar Chowdhry*, compare the case of *Rajah Rooknee Bullub Bahadoor* v. *Junardun Doss Mitter*. *W. R. Misc. App. VI.* 48, in which it was held that a wholly unnecessary and fruitless suit could not be considered to be a "proceeding to enforce a decree" within the meaning of Section 20 of the Limitation Act.

PAGE 215.—The following additional cases illustrating the operation of Section 20, should be noted. The mere act of taking out of Court the proceeds of a previous sale in execution of a decree, is not a proceeding which keeps the decree alive. *Chunder Kant Chuckerbutty* v. *Kishen Mohun Jush. W. R. Misc. App. VI* 49. The mere striking off an application for execution is not a proceeding to enforce a decree. *Maharajah Dheraj Mohatab Chand Bahadoor* v. *Deeno Moyee Dabea. W. R. Misc App. VI.* 60. *Maharajah Dheraj Mohatab Chand Bahadoor* v. *Buloram Singh. W. R. Misc. App. VI.* 63. *Tarinee Churn Gangooly* v. *Tiluck Chunder Ghose. W. R. Misc. App. VI.* 64. An application for execution of a decree followed by the issue of notice to the judgment-debtor, if made *bonâ fide*, *i. e.*, with a real intention and desire on the part of the decree-holder to execute his decree, is a proceeding, within the meaning of Section 20, to keep alive the decree. *Luckhee Narain Chuckerbutty* v. *Ram Chand Sircar. W. R. Misc App. VI.* 63. An order to deposit *tullubana* made on an application for execution, followed by the deposit of the *tullubana*, and service of notice on the judgment debtor, are sufficient proceedings to keep the decree alive. *Treelochun Chatterjee* v. *Radha Monee Dossee W R. Misc. App. VI.* 74.

PAGE 216.—With the case of *Jumal Beebee* v. *Syud Khan*, compare the case of *Chedoo Lal* v. *Nund Coomar Lal*, *W. R. Misc. App. VI.* 60, in which it was held that where one of two defendants appeals against a joint and several decree, and the appeal imperils the whole decree, the time for execution will be computed from the date of the decision in appeal.

PAGE 217.—The case of *Joykurun Lol* v. *Gopal Lall Sahoo*, referred to in the case of *Oopendur Mohun Mustafee* will be found in *Sevestre's Rep. VIII.* 781.

PAGE 218.—With the case of *Okhil Chunder Surkhel* v. *Bromho Moyee Dabea*, compare the case of *Fuzeelutoonissa* v. *Chuttur Dharee Singh*, *W. R. Misc. App. VI.* 43, in which it was held that an attempt at settlement of accounts in Court may be sufficient to keep alive a decree.

PAGE 220.—In accordance with the decision in *Ram Buksh Chatterjee* v. *Brijo Coomar Mullick*, see also the cases of *Ameeroonissa Khatoon* v. *Joheeroonissa Khatoon*, *W. R. Misc. App. VI.* 59; and *Maharanee Indurjeet Koonwur* v. *Mazum Ali Khan. W. R. Misc. App. VI.* 76.

PAGE 222.—The case of *Hurkoo Singh* v. *Baboo Ramkissen*, will be found reported, *W. R. Misc. App. VI.* 44.

PAGE 228.—In connection with the case of *Kool Chunder Chuckerbutty*, see also the cases of *Gour Monee Dabea* v. *Neel Madhub Gooho*, *W. R. Misc. App. V.* 3, and *Gour Monee Dabea* v. *Tiluck Chunder Gooho*, *W. R. Misc. App. VI.* 91.

Where a decree passed before 1859, authorized the judgment-debtor to pay the amount decreed by yearly instalments extending over a period of thirteen years, under the condition that on failure to pay any one instalment execution might issue for the whole sum decreed, and no proceedings were taken by the decree-holder within the time prescribed by Sections 20 and 21 of Act XIV of 1859, it was held that the execution of the decree was barred even as to the instalments falling due within three years previous to the application for execution. *Gour Monee Dabea* v. *Tiluck Chunder Gooho*. *W. R. Misc. App. VI.* 92.

APPENDIX B.

ACTS POSTPONING THE OPERATION OF ACT XIV OF 1859.

ACT No. XI OF 1861.

Passed by the Legislative Council of India. Received the assent of the Governor-General on the 1st May 1861.

I. ALL suits now pending, or which shall be instituted before the 1st day of January 1862, shall be tried and determined as if Act XIV of 1859 (*to provide for the Limitation of Suits*) had not been passed.

Suits now pending or instituted before 1st January 1862 to be tried as if Act XIV of 1859 had not been passed.

II Sections, XIX, XX, XXI, XXII, and XXIII, of the said Act, shall not take effect or have any operation before the said 1st day of January 1862.

Sections 19, 20, 21, 22, and 23 not to take effect till 1st January 1862.

ACT No. XXXII OF 1861.

Passed by the Legislative Council of India. Received the assent of the Governor-General on the 7th September 1861

WHEREAS it is expedient to postpone the operation of so much of Act XIV of 1859 (*to provide for the Limitation of Suits*) as limits the period for the commencement of suits for the amount of bills for articles sold by retail, It is enacted as follows :—

Preamble.

That part of Clause 8 of Section I of the said Act which relates to bills for articles sold by retail, shall not take effect or have any operation before the 1st day of July 1862.

Part of Clause 8, Section 1 of Act XIV of 1859 not to take effect before 1st July 1862.

ACT No XIV OF 1862.

Passed by the Legislative Council of India Received the assent of the Governor-General on the 23rd April 1862.

Preamble.

WHEREAS it is expedient to postpone the operation of so much of Act XIV of 1859 as limits the period for the commencement of suits for the amount of bills for articles sold by retail where the cause of action arose before the passing of that Act; It is enacted as follows .—

Suits now pending or instituted before 1st January 1865, for articles sold by retail, in cases wherein cause of action arose before the passing of Act XIV of 1859, to be tried and determined as if that Act had not been passed

I All suits that may now be pending or that shall be instituted before the 1st of January 1865, to recover the amount of bills for any articles sold by retail, shall, in all cases in which the cause of action arose before the passing of the said Act XIV of 1859, be tried and determined as if that Act had not been passed.

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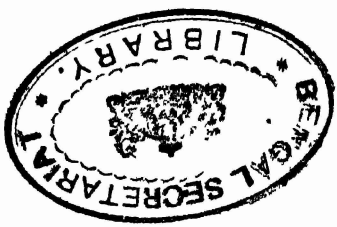
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